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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 768.

THE FIRST NATIONAL BANK OF QUINCY, ILLINOIS, PLAINTIFF IN ERROR,

vs.

S. FRANK HALL, FRANK D. PATTERSON, AUGUSTUS L. PATTERSON, MARTIN V. FRAZEE, AND JEFFERSON E. GREER, PARTNERS, AS HALL, PATTERSON, & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED JUNE 23, 1879.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said court before you, between S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, partners as Hall, Patterson & Co., and The First National Bank of Quincy, Illinois, a manifest error hath happened, to the great damage of the said The First National Bank of Quincy, Illinois, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United
b States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said southern district of Illinois, this eleventh day of April, in the year of our Lord eighteen hundred and seventy-nine, and of our Independence the one hundred and third year.

[SEAL.] J. A. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

(Indorsed:) Filed April 11th, 1879. J. A. Jones, clerk.

c UNITED STATES OF AMERICA, *ss:*

To S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, partners as Hall, Patterson & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein The First National Bank of Quincy, Illinois, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, judge of the district court of the United States for the southern district of Illinois, and one of the judges of the circuit court of said district, this eleventh day of April, A. D. 1879.

S. H. TREAT.

We acknowledge service on us of the within citation this day by copy.

S. FRANK HALL,
FRANK D. PATTERSON,
AUGUSTUS L. PATTERSON,
MARTIN V. FRAZEE,
JEFFERSON E. GREER,
Partners as Hall, Patterson & Co.,
By SLEEPER & WHITON, *Att'ys.*

CHICAGO, *April* 18, 1879.

(Indorsed:) U. S. circuit court, southern district of Illinois. S. Frank Hall et al. vs. First National Bank of Quincy, Illinois. Citation.

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, judge of the district court of said district, and in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit pro tempore, sole judge of said court, on Tuesday, the 25th day of February, at the January term of said court, in the year of our Lord eighteen hundred and seventy-nine, and of our Independence the one hundred and third year.

J. A. JONES, *Clerk.*

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co.,
vs.
THE FIRST NATIONAL BANK OF QUINCY, Illinois. } In case.

2 SOUTHERN DISTRICT OF ILLINOIS, *ss:*

S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co., put in their place Messrs. Sleeper and Whiton, their attorneys, against the First National Bank of Quincy, Illinois, a corporation organized and doing business under the banking laws of the United States, defendant of a plea of trespass on the case, which puts in its place Messrs. Marsh & McFaddon, its attorneys.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 20th day of January, in the year of our Lord eighteen hundred and seventy-seven, came said plaintiffs, by their attorneys, and filed in the office of the clerk of said court their præcipe for summons and bond for costs in said cause, which said bond for costs is in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Circuit court, January term, A. D. 1877.

S. FRANK HALL ET AL.
vs.
THE FIRST NATIONAL BANK OF QUINCY, Illinois. } In law.

3 We enter ourselves security for costs in this cause, and promise

to pay all costs which may accrue to the opposite party in this action, or any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by them, we hereby agree and stipulate that execution may issue against our property for any costs taxed against them. Dated this 14th day of January, A. D. 1877.

SLEEPER & WHITON.

(Endorsed:) Filed January 20, A. D. 1877. J. A. Jones, clerk.

And afterwards, to wit, on said 20th day of January, in the year aforesaid, there was issued out of said clerk's office a summons in said cause directed to the marshal of said district to execute, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss:

The United States of America to the marshal of the southern district of Illinois, greeting:

4 We command you to summon The First National Bank of Quincy, Illinois, if found in your district, to be and appear before our judges of our circuit courts of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co., of a plea of trespass on the case to their damage, as they allege, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this twentieth day of January, in the year of our Lord one thousand eight hundred and seventy seven, and of our Independence the one hundred and first year.

[L. S.] J. A. JONES, *Clerk.*

Return of marshal.

Executed this writ on the 31 day of March, 1877, by delivering a true copy thereof to Caleb M. Pomroy, president of the within named The First National Bank of Quincy, Illinois.

E. R. ROE,
U. S. Mar.,
By E. M. ENGLE,
Deputy.

5 (Endorsed:) Filed June 4, 1877. J. A. Jones, clerk.

And afterwards, to wit, on the 5th day of June, in the year last aforesaid, came said plaintiffs, by their attorneys, and filed in the said clerk's office their declaration in said cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Circuit court of the United States, southern district of Illinois. To June term, A. D. 1877.

S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co., plaintiffs in this suit, by Sleeper & Whiton, their attorneys, complain of The First National Bank of Quincy, Illinois, a corporation organized and doing business at said Quincy under the banking laws of the United States, defendant in this suit, in a plea of trespass on the case.

For that whereas, heretofore, to wit, on the 15th day of Janu-
6 ary, A. D. 1876, the said plaintiffs were engaged in business as dealers in live stock on commission at the Union Stock Yards in Cook County, Illinois, and the said defendant was at the same time as such national bank as aforesaid engaged in carrying on a general banking business at Quincy, in said southern district, and then and there had for a customer one W. G. Melsin, who then and there, likewise, had had certain dealings theretofore with the plaintiffs in the shipment of cattle and other live stock by him, the said Melsin, to them, the said plaintiffs, to be sold upon the usual brokerage or commissions, and the net proceeds of such consignments to be paid over by the plaintiffs in pursuance of the directions of said Melsin, and the said Melsin then and there was a person of very small pecuniary means and would not then, on the said 15th day of January, nor at any time subsequent thereto, have been able to borrow from the plaintiffs any sum of money whatever without first giving them, the plaintiffs, ample security for the repayment thereof, but the plaintiffs aver that prior to said 15th day of January, A.
7 D. 1876, the said Melsin had attempted to induce the said plaintiffs to honor drafts drawn by him on them in favor of the defendant, on account of live stock which he promised to ship to the plaintiffs, but the plaintiffs had notified him, the said Melsin, that they would not honor such drafts until they had been duly informed of the actual shipment to them of live stock sufficient in value to reimburse the plaintiffs for paying such drafts, and in pursuance of this determination of the plaintiffs, and in order to protect themselves, as well as the said defendant, from the result of the possible fraud or misfortune of the said Melsin, they, the said plaintiffs, on the said 15th day of January, A. D. 1876, addressed the defendant, through its cashier, a letter, of which the following is a copy:

"CHICAGO, *January 15th*, 1876.

"U. S. PENFIELD, *Cashier*,
"*Quincy, Ills:*

"DEAR SIR: Hereafter we will only pay drafts on actual consignments. We cannot advance money a week in advance of shipments. The stock must be in transit so as to meet draft same day, or the day after presented to us.

8 "This letter will cancel all previous arrangements of letters of credit in reference to W. G. Melsin. Please acknowledge receipt of this and oblige,

"Yours, respectfully,

"HALL, PATTERSON & CO."

And the plaintiffs further aver that the defendant received said letter in due course of mail, and afterwards, by its cashier, U. S. Penfield, on the 17th day of January, A. D. 1876, addressed to the plaintiffs a reply, of which the following is a copy:

"QUINCY, ILL., *Jan'y* 17, 1876.

"Mess. HALL, PATTERSON & Co.,
"*Chicago:*

"DEAR SIRS: Your favor 15th received. I note what you say. We have never knowingly advanced Melsin any money on stock to come in. Have always supposed it was here in transit. Have always taken his word. After this we shall require ship'g bill.

"Very truly, yours,

"U. S. PENFIELD,
"*Cashier.*"

And the plaintiffs aver that such last mentioned letter was duly received by them on the 18th or 19th day of January, A. D. 1876,
9 and that thereafter they, while well knowing that said Melsin was pecuniarily worthless and unworthy of credit to that extent that they, the said plaintiffs, would not at any time have honored the drafts of the said Melsin on them for any sum of money whatever without full security for so doing, yet, fully relying on the promise and undertaking of the defendant in their said letter contained, that it, the said defendant, would not, from and after the 17th day of January, A. D. 1876, advance any money to the said Melsin on his drafts on the plaintiffs, or accept the same for collection, unless he, the said Melsin, should first deliver to the defendant shipping-bills showing a shipment of stock to the plaintiffs sufficient in value to enable the plaintiffs from the proceeds thereof to pay any such drafts, did from time to time thereafter and prior to December 7th, A. D. 1876, accept and pay numerous drafts drawn on them by the said Melsin in favor of the said defendant, and which had been discounted by the defendant for the said Melsin, or taken from him for collection, and until the committing of the
10 grievances hereafter set forth the said Melsin did invariably, after the said 17th day of January, and prior to December 7th, A. D. 1876, ship to the plaintiffs from Quincy aforesaid, or its vicinity, live stock, which arrived at the plaintiffs' place of business at Chicago, aforesaid, in due time to enable the plaintiffs, either on the same day that such drafts were presented to the plaintiffs for acceptance and payment, or the next day thereafter, to realize from the proceeds thereof sufficient money to indemnify them for paying all such drafts.

And the plaintiffs further aver that afterwards, to wit, on the 7th day of December, A. D. 1876, at the district aforesaid, the said U. S. Penfield, as the cashier of the defendant, prepared two drafts, which he caused to be signed by said Melsin as drawer, upon the plaintiffs (under their said firm name), directed to them at the stock-yards in Chicago, by one of which drafts the said Melsin purported to require the plaintiffs to pay to the order of U. S. Penfield, cashier, two thousand and four dollars, on account of S. C. Tuly's four loads of hogs and cattle,
11 and by the other, to the order of the same payee, two thousand five hundred and five dollars, on account of Jos. Hunnegle's five loads of stock, and the said Penfield was then and there the cashier of the defendant and well knew that the plaintiff had before that time frequently received shipments of stock from the said Melsen which had

been purchased from or through the said Tuly and the said Hunnegle, and would be likely to be deceived and misled by the memoranda upon said drafts indicating shipments of stock purchased from or through them, the said Tuly and Hunnegle, yet he, the said Penfield, as such cashier as aforesaid, colluding and conspiring with the said Melsen to deceive and defraud the plaintiffs by inducing the plaintiffs to pay the two last-mentioned drafts, although he, the said Penfield, then and there well knew that the memoranda upon said drafts indicating a shipment of stock to the plaintiffs, purchased from the said Tuly and Hunnegle, and from the proceeds of which the plaintiffs might be indemnified for paying such two last-mentioned drafts, were false and calculated to de-
12 ceive the plaintiffs, and although he, the said cashier, then and there well knew that the said Melsen had never procured any shipping bills from any common carrier or other person or corporation, for the hogs, cattle, and stock referred to in said two last-mentioned drafts or any portion thereof, and that he, the said Melson, had no hogs, cattle, stock, or other property from the proceeds of which the plaintiffs might be reimbursed for paying the said two last-mentioned drafts, either in whole or in part, and that he, the said Melsen, had not shipped, and did not intend to ship any cattle, hogs, stock, or other property of value to the plaintiffs from the proceeds of which the plaintiffs might reimburse themselves, in any part, for paying such two last-mentioned drafts, and that if the plaintiffs should pay such two drafts without security for reimbursement therefor they would lose the whole sum advanced for such payment, but wholly disregarding the promises and agreements in the said letter of said cashier contained, he, the said Pen-
field, as such cashier, omitted and neglected to require from the
13 said Melsen any shipping bills for the cattle, hogs, and stock mentioned in the said drafts, although he then and there well knew that the plaintiffs would not pay said two drafts or either of them, or any part thereof, if they knew at the time of such payment that he had not required the delivery to him of shipping bills for all the cattle, hogs, and stock referred to in said two drafts before forwarding the same for collection from the plaintiffs, but craftily and subtlely intending to aid the said Melsen in deceiving and defrauding the plaintiffs by inducing them to pay such drafts without any security for reimbursement therefor, and while relying upon and confiding in the aforesaid promises of him, the said cashier, and thereby to cause the plaintiffs to suffer a loss of the whole amount so paid, he, the said Penfield, as such cashier as aforesaid, immediately after the preparation of such two drafts by him as aforesaid, forwarded the same to the Union Stock Yards Bank of Chicago, aforesaid, for collection on account of and for the credit of the defendant.

And the plaintiffs further aver that afterwards, to wit, on the
14 9th day of December, A. D. 1876, the said two drafts were presented to the plaintiffs for payment by the said Union Stock Yards Bank at Chicago, aforesaid, at the place of business of the plaintiffs in Chicago aforesaid, and the plaintiffs at the time and place last aforesaid, without any knowledge of the negligence, fraud, and collusion of the defendant aforesaid, after examining such two drafts and seeing that they had been prepared by the said cashier, and believing from the memorandums thereon written that cattle, hogs, and stock were then in transit to them of sufficient value to enable them from the proceeds thereof to indemnify themselves on the same or the next succeeding day for paying such drafts, and that as in the case of many similar previous drafts the said defendant had discounted the same for the said

Melsen after receiving from him as security shipping bills for all the cattle, hogs, stock, or other property referred to in the same, and relying upon and confiding in the aforesaid promises of the defendant in the aforesaid letter of its cashier contained, in substance that it would not take for collection from the said Melsen or discount for him his
15 drafts on the plaintiff unless he, the said Melsen, had first delivered to the defendant shipping bills for stock shipped to the plaintiffs by said Melsen of sufficient value to enable them to realize therefrom sufficient money to reimburse them for paying such drafts, they, the said plaintiffs, paid to the said Union Stock Yards Bank for the use of the defendant, the full amount required to be paid in the said two drafts so made on the said 7th day of December, to wit, the sum of $4,509.00, to wit, on the said 9th day of December, at Chicago, to wit, in the district aforesaid.

And the plaintiffs further aver that after they had paid the said two last-mentioned drafts as aforesaid, they waited expecting the arrival of he hogs, cattle, and stock referred to in such drafts at Chicago aforesaid all of the 9th and 10th days of December, A. D. 1876, but as no such property came from the said Melsen or any other party to the plaintiffs on either of such days, or at any time thereafter, they, the said plaintiffs, becoming alarmed, began to make enquiries in regard to said Melsen and the property pretended to be shipped to them to indemnify them for paying such drafts, and afterwards, to wit, on the 11th day of
16 December, A. D. 1876, they ascertained, as the fact was, that said Melsen, immediately after the signing of the said two drafts last mentioned, had absconded to parts unknown, and that the said cashier had taken such two drafts from the said Melsen and forwarded them for collection from the plaintiffs at Chicago in the manner aforesaid, without requiring from the said Melsen any shipping bills or other evidence that he, the said Melsen, had shipped or was about to ship any cattle, hogs, stock, or other property to the plaintiffs from the proceeds of which the plaintiffs might indemnify themselves for paying such two last-mentioned drafts, and the said plaintiffs have not in fact at any time received from the said Melsen or any other party any money or property to indemnify them in whole or in part for the payment of such drafts.

And the plaintiffs aver that after diligent enquiries they have been unable to ascertain where the said Melsen went when he so absconded as aforesaid, or where he is now; that he left no visable effects in this district or elsewhere from which the plaintiffs might realize any
17 portion of the money so by them paid upon the said two last-mentioned drafts; that the said Melsen is indebted to the plaintiffs in the full amount so by them paid upon such two drafts, over and above all just credits, deductions, and legal or equitable set-offs, and that he is utterly insolvent and pecuniarily worthless.

Wherefore the plaintiffs say that by reason of the premises aforesaid, and the sheer carelessness, negligence, fraudulent collusion, and conspiracy of the defendant as aforesaid, they have wholly lost the said sum of money so paid by them upon the said two last-mentioned drafts, to their damage ten thousand dollars; wherefore they bring suit, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

(Endorsed:) Filed June 5th, A. D. 1877. J. A. Jones, clerk.

And afterwards, to wit, on said 5th day of June, in the year last aforesaid, came said defendant, by its attorneys, and filed in said clerk's

office its motion for a continuance in said cause, which said motion is in the words and figures following, to wit:

18 *Motion for continuance.*

In the United States circuit court for the southern district of Illinois.
To June term, A. D. 1877.

S. FRANK HALL, PATTERSON, ET ALS., PARTNERS, &c.,
vs.
THE FIRST NATIONAL BANK OF QUINCY, ILLINOIS. } 203.

And now comes said defendant, by Marsh & McFadon, its attorneys, and moves for a continuance of said cause for want of declaration in time.

By MARSH & McFADON,
Att'ys F. D.

(Endorsed:) Filed June 5, 1877. J. A. Jones, clerk.

And afterwards, to wit, on Friday, the 15th day of June, at the June term of said court in the year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

Order of continuance.

S. FRANK HALL ET AL.
vs.
FIRST NATIONAL BANK OF QUINCY. } In case.

On motion of defendant, by Messrs. Marsh and McFadon, its attorneys, this cause is continued for want of declaration being filed in time.

19 And afterwards, to wit, on Monday, the 7th day of January, at the January term of said court, in the year of our Lord eighteen hundred and seventy-eight, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order setting cause for hearing.

S. FRANK HALL ET AL.
vs.
FIRST NATIONAL BANK OF QUINCY. } In case.

By consent of parties, by their attorneys, this cause is set for hearing on Tuesday, the 29th day of January inst.

And then afterwards, to wit, on the 15th day of January, in the year last aforesaid, came said defendant, by its attorneys, and filed in said clerk's office its plea in said cause, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. To the January term, A. D. 1878.

THE FIRST NATIONAL BANK OF QUINCY, ILLINOIS
ads.
S. FRANK HALL ET ALS.

20 And the said defendant, the said The First National Bank of Quincy, Illinois, by Marsh & McFadon, its attorneys, comes & defends the wrong and injury when, &c., and says that it is not guilty of the said supposed grievances laid to its charge in manner & form as the said plaintiffs have in their said declaration thereof complained against it, and of this the said defendant puts itself upon the country.

By MARSH & MCFADON,
Its Attorneys.

(Endorsed:) Filed January 15th, A. D. 1878. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 29th day of January, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order setting cause for hearing.

S. FRANK HALL ET AL.
vs.
FIRST NATIONAL BANK OF QUINCY. } In case.

On motion of defendant, by Messrs. Marsh and McFadon, its attorneys, this cause is set for hearing on Thursday, the 7th day of February next.

21 And afterwards, to wit, on the 7th day of February, in the year last aforesaid, came the parties in said cause, by their attorneys, and filed in said clerk's office their stipulation in said cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

Circuit court U. S., southern district of Ill's.

S. FRANK HALL ET AL.
vs.
THE FIRST NATIONAL BANK OF QUINCY.

It is hereby stipulated between the attorneys for the respective parties that this cause shall be submitted to the court for trial without a jury at some time during the month of February, 1878, after the 13th, unless one or other of the parties shall notify the other on or before Saturday, the 9th instant, of their or its election to have the case tried by a jury. And in case either party shall elect to have a jury trial and

the jury in attendance upon the court shall be discharged before this cause is brought to trial, then it is agreed that the marshal may summon a special jury to try this case, and the cause shall be tried
22 in such event by such jury, subject only to such objections as might be taken to a jury on the regular panel.

MARSH & McFADON,
For Defendant.
SLEEPER & WHITON,
Pl'ffs' Att'ys.

(Endorsed:) Filed February 7, 1878. J. A. Jones, clerk.

And afterwards, to wit, on Friday, the 22nd day of February, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Hearing of cause.

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co.,
vs.
FIRST NATIONAL BANK OF QUINCY, ILLINOIS. } In case.

This day come as well the plaintiffs, by Messrs. Sleeper and Whiton, their attorneys, as the defendant, by Messrs. Marsh and McFadon, its attorneys, and issue being joined, whereupon comes a jury of good and lawful men, to wit, John Cook, George W. Krodell, A. J. Allen,
23 R. H. Beach, Douglass Hickox, James Wickersham, Joseph Lane, Samuel S. Elder, A. C. Hayden, Obadiah Twigg, M. O. Reeves, and T. C. Mather, duly elected, tried, and sworn to try said issue; and having heard the evidence, the further trial of this cause is postponed to to-morrow morning for argument of counsel.

And afterwards, to wit, on Saturday, the 23rd day of February, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Discharge of jury & continuance.

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co.,
vs.
FIRST NATIONAL BANK OF QUINCY, ILLINOIS. } In case.

This day come again the parties, by their attorneys, and also the jury impanelled and sworn herein, who, having heard argument of counsel and received the instructions of the court, fail to agree upon a verdict, and are by the court discharged and this cause continued.

24 And afterwards, to wit, on Monday, the 1st day of July, at the June term of said court, in the year last aforesaid, the following further proceedings were had in said court and entered of record in said case, to wit:

Order of continuance.

S. FRANK HALL ET AL.
vs.
FIRST NATIONAL BANK OF QUINCY. } In case.

On motion of defendant, by Messrs. Marsh and McFadon, its attorneys, and on affidavit filed, this cause is continued at cost of defendant.

It is therefore ordered and adjudged that the plaintiffs recover of the defendant the costs and charges by them about their suit at this term expended, and that execution issue therefor.

And afterwards, to wit, on Thursday, the 9th day of January, at the January term of said court, in the year of our Lord eighteen hundred and seventy-nine, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order setting cause for hearing.

S. FRANK HALL ET AL.
vs.
FIRST NATIONAL BANK OF QUINCY. } In case.

25 By consent of parties, by their attorneys, this cause is set for hearing on the 30th day of January inst.

And afterwards, to wit, on Wednesday, the 12th day of February, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order setting cause for hearing.

S. FRANK HALL ET AL.
vs.
FIRST NATIONAL BANK OF QUINCY. } In case.

By consent of parties, by their attorneys, this cause is set for hearing on Monday, the 17th day of February inst.

And afterwards, to wit, on Monday, the 17th day of February, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Hearing of cause.

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co.,
vs.
FIRST NATIONAL BANK OF QUINCY, ILLINOIS. } In case.

26 This day come as well the plaintiffs, by Messrs. Sleeper and Whiton, their attorneys, as the defendant, by Messrs. Marsh and McFadon, its attorneys, and issue being joined, whereupon comes a jury of good and lawful men, to wit, Thomas L. Connor, August Finke, John C. Hughes, Stephen Maddux, Robert S. McConnell, A. M. Sturman,

John Symonds, A. B. Irwin, J. G. Babbitt, J. C. Hall, James Dunn, and J. J. Schrayer, duly elected, tried, and sworn to try said issue, and having heard the evidence, the further trial of this cause is postponed until to-morrow morning for argument of counsel.

And then afterwards, to wit, on Tuesday, the 18th day of February, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Verdict.

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co.,
vs.
FIRST NATIONAL BANK OF QUINCY, ILLINOIS. } In case.

This day come again the parties, by their attorneys, and also the jury impanelled and sworn herein, who, having heard the argument
27 of counsel and received the instructions of the court, for verdict say: "We, the jury, find the issue for the plaintiffs and assess their damages at the sum of five thousand one hundred and two dollars and sixty-three cents."

Whereupon defendant enters its motion for a new trial herein.

And afterwards, to wit, on Tuesday, the 25th day of February, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Judgment.

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co.,
vs.
FIRST NATIONAL BANK OF QUINCY, ILLINOIS. } In case.

This day this cause came on to be heard upon motion of defendant entered February 18th, 1879, for a new trial herein, and the court having heard argument of counsel and being sufficiently advised in the premises overrules said motion.

It is therefore ordered and adjudged by the court that the
28 plaintiff recover of the defendant the said sum of five thousand one hundred and two dollars and sixty-three cents, their damages aforesaid assessed by the jury, together with the sum of forty-six dollars and four cents, their costs and charges by them about their suit in this behalf expended, and that execution issue therefor.

And thereupon the defendant tenders its bill of exceptions, which is signed, sealed, and made part of the record; and on its further motion, a writ of error to the Supreme Court of the United States, to operate as a supersedeas, is allowed on its entering into bond to the plaintiffs, in the penalty of seven thousand dollars, conditioned as the law directs, with security to be approved by the court, within sixty days from this date.

The said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for said district, of the January, A. D. 1879, term.

UNITED STATES OF AMERICA,
Southern District of Illinois:

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co., plaintiffs,

versus

THE FIRST NATIONAL BANK OF QUINCY, Illinois, defendant.

} In case.

Be it remembered that on the trial of the said cause, before the Hon. Samuel H. Treat, judge of the district court of the United States for said southern district of Illinois, holding said circuit court at the said January term, A. D. 1879, of the said circuit court of the United States for said southern district of Illinois, the said plaintiffs, to maintain the issues upon their part, produced one Frank D. Patterson as a witness, and after said witness had been duly sworn in said cause the said plaintiffs proved by him:

That he, the said Frank D. Patterson, was one of the plaintiffs
30 in the said suit, and that he was one of the members of the firm of Hall, Patterson & Co., by whom said suit was brought;

That a firm of Hall, Patterson & Co., of which witness was a member, had existed during the years 1874, 1875, and 1876, and perhaps said firm commenced its existence earlier than the year 1874;

That he, the said Frank D. Patterson, had been a member of said firm of Hall, Patterson and Co. from the time of the existence of said firm and during the years 1874, 1875, and 1876, and until and after the commencement of this suit; that the said firm of Hall, Patterson & Co. from its said commencement, and during the years 1874, 1875, and during the months of January, February, and March, 1876, and until the first day of April, 1876, was composed of S. Frank Hall, Augustus L. Patterson, and the witness, Frank D. Patterson, three of the plaintiffs in this suit;

That on the first day of April, 1876, Martin V. Frazee and Jefferson E. Greer, two of the plaintiffs in this suit, were admitted as members of the said firm of Hall, Patterson & Co., and as partners therein;

That from said first day of April, 1876, during the remainder of said year 1876, and until after the commencement of this suit, the firm
31 of Hall, Patterson & Co. was composed of said S. Frank Hall, witness, Frank D. Patterson, said Augustus L. Patterson, said Martin V. Frazee, and said Jefferson E. Greer;

That said Martin V. Frazee and said Jefferson E. Greer, prior to the first day of April, 1876, and during January, February, and March, 1876, were in the employ of the firm of Hall, Patterson & Co. as then constituted;

That the business of said firm of Hall, Patterson & Co. at all times since its existence and during the years 1874, 1875, and 1876, was selling

live stock on commission at the Union Stock-Yards, at Chicago, Illinois; that the said firm, in the transaction of their said business, during the said last named years, had employed agents to travel for them through various parts of the west and to solicit consignments to them:

That during said years 1874, 1875, and 1876, the city of Quincy, Illinois, was an important point for the business of said firm, and during the years 1874, 1875, and during the year 1876, up to the seventh day of December of that year, and until his disappearance as hereinafter mentioned, the said firm of Hall, Patterson & Co. had had William G. Melson in their employ, as their agent at Quincy, Illinois, for the
32 city of Quincy, Illinois, and for North Missouri; prior to said Melson becoming the agent of said Hall, Patterson & Co., the said Melson had been in the habit of consigning stock to said firm of Hall, Patterson & Co. to sell for him on commission;

After said Melson became the agent of said firm, and up to and until January, 1876, said Melson continued to ship stock of his own to said firm of Hall, Patterson & Co., to be sold by them on commission for the account of said Melson. In reply to a question propounded by his attorneys, the witness, on his direct examination, stated that Melson drew a draft (a sight draft), dated January 4th, 1876, for one hundred & twenty-five dollars on the firm of Hall, Patterson & Co., payable to the order of the defendant, The First National Bank of Quincy, Illinois; that said draft was not paid by said firm on its presentation for payment, and that out of this draft a controversy arose between said Hall, Patterson & Co. & said bank, by letter; but none of the letters or correspondence relating to said controversy were offered in evidence by said plaintiffs.

The plaintiffs, after having made proper proof of the signature,
33 offered in evidence a letter signed Hall, Patterson & Co., which was partly in print and partly in writing.

The printed portion of said letter was at the head of the sheet and was the letter-head thereof, and was in the words following, to wit:

"All drafts upon us must have bill of lading attached, and not exceed two-thirds value of consignment."

S. F. Hall, F. D. Patterson, A. L. Patterson; Hall, Patterson & Co. Live-stock commission merchants. Union Stock-Yards.

The written portion of said letter was immediately under said printed portion, and was in the words and figures following, to wit:

CHICAGO, *Jan'y 15th*, 1876.

U. S. PENFIELD, *Cashier*,
Quincy, Ill's:

DEAR SIR: Hereafter we will only pay drafts on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day, or the day after presented to us.

34 This letter will cancel all previous arrangement of letters of credit in reference to W. G. Melson.

Please acknowledge receipt of this and oblige.

Yours, respectfully,

HALL, PATTERSON & CO.

The defendant, by its attorneys, upon the said plaintiffs' offer to introduce said letter in evidence, objected to its admission in evidence for the following reasons:

Firstly. Because it appearing by the testimony of the witness Frank

D. Patterson himself that the firm of Hall, Patterson & Co. was composed of S. Frank Hall, Frank D. Patterson, and Augustus L. Patterson, at the time said letter was written, the letter is written by other and different persons than those by whom this suit is brought, and is consequently irrelevant and immaterial as evidence in this suit.

Secondly. Because of a variance between the allegations of said plaintiffs' declaration as to the persons by whom said letter was written and the proofs as to who wrote the same, the said declaration alleging that said letter was written by the plaintiffs in this suit, and the proof being that it was written by S. Frank Hall, Frank D. Patterson,
35 & Augustus L. Patterson, only, constituting Hall, Patterson & Co.; but the court overruled the said objection of the said defendant, by its attorneys, to the admission of said letter in evidence, and admitted the said letter to be read in evidence, and the same was thereupon read in evidence to the jury, to which opinion and decision of the court in overruling said last-named objection of the said defendant made by its attorneys to the admission of said letter in evidence and allowing the same to be read in evidence, the said defendant, by its attorneys, then & there, at the time said decision was made, excepted.

The plaintiffs then proved by said Patterson that the letter of January 15th, 1876, above mentioned, was known to all the plaintiffs, said Greer and Frazee as well as the others.

The plaintiffs, after having proved the signature to be that of U. S. Penfield, offered in evidence a letter in the words and figures following, to wit:

QUINCY, ILL., *Jan'y* 17, 1876.

Messrs. HALL, PATTERSON & CO.,
Chicago:

DEAR SIRS: Your favor 15th received. I note what you say.
36 We have never knowingly advanced Melson any money on stock to come in. Have always supposed it was here in transit. Have always taken his word. After this we shall require ship'g bill.

Very truly yours,

U. S. PENFIELD,
Cashier.

Upon the offer of said plaintiff to introduce the said letter, dated Jan'y 17th, 1876, in evidence, the defendant, by its attorneys, objected to its admission in evidence for the following reasons:

Firstly. Because the evidence having shown that the firm of Hall, Patterson & Co. was composed of S. Frank Hall, Frank D. Patterson, and Augustus L. Patterson at the date said last named letter was written, the letter is written to other & different persons than the plaintiffs in this suit, and is consequently irrelevant & immaterial in this suit.

Secondly. Because of a variance between the allegations of said plaintiff's declaration, as to the persons to whom said last named letter was written or addressed, and the evidence on that point, said allegations being that said letter was addressed to the plaintiffs in this
37 suit, and the evidence proving that it was addressed to S. Frank Hall, Frank D. Patterson, and Augustus L. Patterson, composing the firm of Hall, Patterson & Co. at that time; but the court overruled the said objection of said defendant so made by its attorneys to the admission of said last named letter in evidence, and decided that the same was admissible in evidence, and thereupon allowed the same to be read in evidence to the jury; to which decision and opinion of the

court in overruling said last named objection of said defendant, and in ruling that said letter was admissible in evidence and in allowing the same to be read to the jury, the defendant, by its attorneys, then & there at the time said decision was made excepted.

Proceeding with the examination of said witness Frank D. Patterson, plaintiffs proved the receipt of said last named letters, and also that the two drafts next hereinafter named were signed by William G. Melson; and thereupon plaintiffs offered in evidence two drafts, partly in print and partly in writing, with the endorsements on each of them.

The said drafts and said endorsements are respectively in the
38 words and figures following, to wit, the printed words of said respective drafts being underscored [italicised] thus:

$2,004.00.] *Quincy, Ill's*, Dec. 7, *1876.*

Pay to the order of U. S. Penfield, cas., two thousand and four *dollars*, ⅋ S. C. Tooley, 4 l'ds hogs & cattle.

(Signed) W. G. MELSON.

To Hall, Patterson & Co.
Stock Yards, Chicago.

On which draft was the following indorsement:

Pay E. S. Stickney, cash., or order for collection account of First National Bank, Quincy, Ill's.

(Signed) U. S. PENFIELD, *Cash.*

$2,505.] *Quincy, Ill's*, Dec. 7, *1876.*

Pay to the order of U. S. Penfield, cas., twenty-five hundred & five *dollars*, ⅋ Jos. Hunneyle, 5 l'ds stock.

(Signed) W. G. MELSON.

To Hall, Patterson & Co.,
Stock Yards, Chicago, Ill's.

On which was an endorsement, as follows:

Pay E. S. Stickney, cash., or order for collection account of First National Bank, Quincy, Ill's.

(Signed) U. S. PENFIELD, *Cash.*

39 Proceeding with the examination of said witness, Frank D. Patterson, plaintiffs proved by him that the body of said drafts was filled up in the handwriting of said U. S. Penfield, & that said E. S. Stickney was, during December, 1876, cashier of the Stock Yards Bank, at Chicago, Illinois; that said two drafts of December 7th, 1876, were presented to plaintiffs in this suit for payment on December 9th, 1876, by some teller of said Stock Yards Bank, and by them paid to said Stock Yards Bank on December 9th, 1876; and that no stock was ever received from said William G. Melson or any other person, out of which said plaintiffs could reimburse themselves for having paid such two drafts; and that said firm of Hall, Patterson & Co., held no security from the said Melson & had never received a cent back of the moneys, amounting to forty five hundred & nine dollars, paid by them on such two drafts, from said Melson or any other person, but the whole of such sum had been lost to the plaintiffs; that witness never saw said Melson after December 6th, 1876, though he had searched for him and had visited Clarence, Missouri, where said Melson resided; that witness
40 could not, after diligent enquiry, hear any thing of said Melson as a result of his efforts to find him, and could not hear of anybody

that had seen or heard anything of him since the evening of December 6th, 1876.

Witness knew of no property, though he had made careful search, belonging to Melson in Illinois or anywhere else, & believed him to be insolvent if alive, and did not know whether said Melson was alive or dead; that said Melson disappeared the night of December 6th, 1876, and that the last witness ever heard of him was that he was in Quincy that night.

Witness was then shown a bundle of drafts containing thirty-one drafts, which he identified as being drafts drawn by William G. Melson on the firm of Hall, Patterson & Co., composed of the plaintiffs, between April 8th, 1876, and December 6th, 1876, and cashed through the defendant bank & paid by the plaintiffs, constituting said firm of Hall, Patterson & Co. He then testified that the body of said drafts, excepting perhaps five or six, was filled out in the handwriting of U. S. Penfield, the cashier of the defendant bank. All of said drafts purport, excepting some little drafts for wages, to be on account, the witness stated, of stock, and as to the other than the wages drafts, that
41 the stock, except in the cases of the two drafts dated December 6th, 1876, above mentioned, always came in to the plaintiffs.

Witness then stated that from the time the letter of January 15th, 1876, above named & set forth, was written, he had no knowledge that any drafts of said Melson were cashed by the defendant not drawn against shipments of stock in transit, and from the time said letter ter dated January 15th, 1876, was written to the time of paying the two drafts dated December 6th, 1876, he did not know that any drafts drawn by Melson on Hall, Patterson & Co. had been cashed by the defendant bank, where the shipments were not made and the stock in transit as they purported on the face of the drafts to be, except perhaps in the case of one draft, which he did not know whether it was for wages or not.

The witness then stated that the firm of Hall, Patterson & Co. telegraphed said U. S. Penfield about the stock connected with the two drafts of December 7th, 1876, paid by them and above set forth, but he could not say whether it was done before or after the same had been paid, and that a reply was received by telegraph from said Penfield.

42 The witness was then asked the following questions, which he answered as after each question is stated.

1. Q. Have you any copies of the telegrams or the telegrams themselves?

Ans. No, sir; they were destroyed. These telegrams when they get old become such a bundle they are thrown into the waste basket.

2. Q. Have you searched for these papers?

Ans. Yes, sir.

3. Q. Have you inquired at the telegraph office?

A. Yes, sir; can't get copies of telegrams that are over six months old. That's their practice.

4. (Question by the court.) Is that their practice?

Ans. Yes, sir; couldn't get it. Mr. Goff, manager at Chicago, told me they kept all telegrams till they were six months old & then destroyed them.

The interrogatories last aforesaid, numbered from 1 to 4, both inclusive, with the respective answers thereto, contain all the evidence that was introduced as a foundation for the answer to the interrogatory next

hereinafter mentioned. No officer, agent, or employee of the telegraph company was put upon the stand to testify, nor was the said Mr. Goff offered as a witness by said plaintiffs, although the defendant insisted that his declarations were inadmissible & objected
43 the same.

The next question asked the witness was the following:

Question. Now I will ask you to state what you telegraphed him, and what his reply was.

(The defendant, by its attorneys, then & there objected to the witness answering said question for the following reasons:

Firstly. That the defendant had had no notice to produce the original or any copies of the two despatches whose contents it is proposed to prove, the only notice served upon the defendant being a notice to produce all original letters addressed to said defendant or U. S. Penfield, its cashier, by the plaintiffs in this suit in relation to the business & dealings of the plaintiffs with one W. G. Melson, and especially a letter addressed to said defendant or said Penfield on the 15th day of January, A. D. 1876, and also all correspondence between said defendant or said Penfield and one Libby, the superintendent or manager of the stock yards in Quincy, Illinois, in relation to the business of said Hall, Patterson & Co., or said Melson at said stock yards, or in the shipping of live stock, also all copies you may have of letters to said
44 Libby, or other parties engaged at said stock yards, relating to the business of said Melson or said plaintiffs in this suit.

Secondly. Because the proper foundation has not been laid for the introduction of secondary evidence of the contents of the two despatches inquired about in said interrogatory.)

But the court overruled the said objection of said defendant, and allowed the witness to answer said question; to which decision and opinion of the court in overruling said objection, and allowing said question to be answered, the defendant, by its attorneys, then & there excepted.

The witness answered said last mentioned interrogatory as follows:

We telegraphed Mr. Penfield to know where Mr. Hunnegle's and Mr. Pooley's stock was, and his reply was it had gone by the way of Hannibal, Missouri, which is south of Quincy some ways, and one of the ways that stock from Missouri might go to Chicago.

The witness then stated that stock going via Hannibal would go over the Wabash road, & not through Quincy at all, on its way to Chicago, and that after the payment of the drafts he went to Quincy to see
45 Mr. Penfield.

The witness was then asked to state the conversation with Mr. Penfield. He answered as follows:

I went to the bank and saw Mr. Penfield, and told him there was no stock to meet the drafts, and wanted to know what he would do about it. I don't know but I went there second time; at least Mr. Penfield told me after I explained to him. He said he thought he had another letter of credit. Says I, "You can look it up between this and to-morrow morning, and I will go out to Clarence, where Mr. Melson lives, and see if I can hear of him." Came back the next morning and asked if he found any other letter from us, and he said he hadn't. ["Then," says I, "I suppose we will get our money." Says he, "I think you will; I think we shall pay it;" and, says he, "You can go back to Chicago, and I think the money will be sent to you."] I asked him where the stock had gone; he said he didn't know; he said he supposed it had gone to Chicago. I asked him if he had no shipping bills; he said no.

(The defendant's counsel objected & excepted to so much of the

46 last answer as is in brackets [ ], and moved to exclude the same from the jury, for the reason that no proof had been given that the cashier of the defendant bank had power to settle or compromise or determine as to claims against the defendant; but the court overruled said objection, and refused to exclude said evidence so excepted to from the jury; to which decision & opinion of the court, in overruling said objection & refusing to exclude said evidence, the defendant, by its attorneys, then and there excepted.)

The witness then testified that he never made any other arrangement with the defendant in regard to paying drafts than that indicated in the letter dated January 15th, 1876, in evidence, and that Melson had no authority from him to draw drafts except on stock in transit.

On cross-examination of said Frank D. D. Patterson, it was proven that it was the business of said Melson, as the agent of Hall, Patterson & Co., to get consignments of stock for said firm at Quincy, Illinois, and North Missouri; that consignments were often obtained by him
47 without having to advance any money; that that was the most desirable business said firm had, for they sold stock so consigned, deducted their commissions, and returned the proceeds to the consignor, and the said firm was not out anything on such consignments.

That in a good many other cases, owing to competition & the efforts of the agents of other houses doing business at the stock yards in Chicago to secure stock about to be shipped at Quincy & from North Missouri, the consignment of the stock could only be secured by said Melson to said Hall, Patterson & Co. by making advances to the owner at Quincy, Illinois.

That these advances could only be gotten by arranging with some bank at said Quincy to cash his, said Melson's, draft on the said Hall, Patterson & Co.

That, to enable said Melson, in the transaction of the business of Hall, Patterson & Co., to make such advances, and to furnish money to secure consignments, said Melson had been empowered by said firm to draw drafts on them, and the same had been cashed by the defendant bank, and that Melson had been in the habit at all times during his agency of getting his drafts cashed at said bank.

48 That before said Melson could do business at the stock yards at said city of Quincy, the superintendent of said Quincy yards required the evidence of his authority to act as the agent of said firm.

That, in pursuance of said requirement, said firm filed in said stock yards at Quincy a letter in the words and figures following, to wit:

[All drafts drawn upon us must have bill of lading attached, and not exceed two thirds value of consignment. S. F. Hall, F. D. Patterson, A. L. Patterson; Hall, Patterson & Co., live-stock commission merchants. Union Stock Yards.]

CHICAGO, *Jan'y 1st*, 1876.

To whom it may concern:

This is to certify that W. G. Melson is our authorized agent, Quincy, Ills., and North Missouri, for the year A. D. 1876.

(Signed) HALL, PATTERSON & CO.

That a similarly worded letter was filed in said stock yards for the year 1875, and during all the time said Melson acted as agent of said Hall, Patterson & Co. at said Quincy there was such a paper on file at said
49 Quincy stock yards, under which said Melson acted; that the one

for 1876 was never changed or withdrawn, but remained at the Quincy stock yards during the year 1876.

The said Melson, during the entire period of his agency, very often, though perhaps not always, advised Hall, Patterson & Co. of consignments made to them by him, or as a result of his agency, by letter, stating the fact, & whose the stock was. The practice of said firm was to sell the stock consigned to them, deduct the commissions charged by said firm, and for the net proceeds of the consignment the firm accounted to the consignor. If a draft had been drawn by Melson against the stock, that was also deducted from the proceeds of sales, and for only the balance then remaining the firm accounted to the consignor. The witness stated that prior to January 15th, 1876, said Melson shipped a good deal of stock of his own to said firm for sale on commission; that after January 15th, 1876, he shipped some stock of his own consigned to Hall, Patterson & Co. from time to time, but how many such instances witness could not say, as the firm got a good deal of stuff that others of the firm handled. When Melson shipped stock of his own, the
50 proceeds of the consignment were dealt with and accounted for by said firm as in cases of other persons. He drew against stock he consigned as other people did.

Witness said that he did not know that his firm had, after January 15th, 1876, paid any drafts of Melson, cashed by the defendant bank, and drawn by said Melson, to raise money to be used in making advances on stock in Missouri in advance of its shipment. Four drafts were selected by witness out of those identified by him on his direct examination as drawn by Melson, which witness said Hall, Patterson & Co. paid with the knowledge that they were not drawn against stock, but which witness testified were for Melson's wages. A fifth draft was also selected from said number, which witness testified had been paid by said firm, on the supposition that it was partly to cover stock and partly to pay Melson his wages. Said five last named drafts are hereinafter given in evidence, and said fifth draft witness thought was filled up in Melson's handwriting. It was proven by witness that no shipping bills or bills of lading ever accompanied any drafts when paid by Hall, Patterson & Co., or when presented to them for payment
51 which had been drawn by said Melson & cashed by the defendant bank or its cashier, and that said Hall, Patterson & Co. had never required, asked for, or about, or received any shipping bills or bills of lading from said defendant bank or its cashier or other officer thereof, and that between the receipt of the letter of U. S. Penfield, cash., in evidence, dated January 17th, 1876, by said Hall, Patterson & Co. and the 12th day of December, 1876, no correspondence of any kind took place between said Hall, Patterson & Co. and the defendant bank, or any officer or employee thereof; that said Hall, Patterson & Co. never replied to said letter of January 17th, 1876, and that the ordinary running time for freight trains was twenty-four hours between Quincy & Chicago.

Whether Melson got the railroad company to release or deliver to him at said Quincy, from time to time, stock which came through from North Missouri consigned to Hall, Patterson & Co., Chicago, and whether Melson sold to other parties at Quincy any stock so released, witness did not know. He had no particular recollection about it, & didn't know it was being done.

52 The four plaintiffs, other than Frank D. Patterson, testified about the despatch to Penfield spoken of by witness, Frank D. Patterson, and the answer thereto.

One of them testified he thought Penfield's answer was received on the 9th of December, 1876. The answer was, the stock it was supposed went through Hannibal.

Another said he saw said answer, and it was, "Stock not here—supposed to have gone to Hannibal."

Another said the answer was received from the 8th to 12th of December, 1876—he could not say when—and said stock had gone by way of Hannibal.

The fourth said, "I remember the answer from Mr. Penfield; I only remember he said, 'stock not here,' & about its being in Hannibal. Thought it had gone through Hannibal."

The drafts identified by Frank D. Patterson were then introduced in evidence.

The first of the four spoken of by him as drawn for wages was in the words & figures following, to wit: the printed part being underscored [italicized]:

53 $160.60.] *Quincy, Ills., Apr'* 24, 1876.

Pay to the order of U. S. Penfield, cas', one hundred & sixty & $\frac{60}{100}$ *dollars.*

To Hall, Patterson & Co.,
U. S. Y'd., Chicago, Ill.
(Signed) W. G. MELSON.

The other three differed from the above only in dates & amounts. They were respectively dated June 21, 1876, August 14, 1876, & October 23rd, 1876, & respectively for the sum of fifty dollars, twenty-five dollars, and one hundred dollars.

The fifth draft, which said witness thought was partly for stock & partly for wages, was in the words & figures following, to wit: the printed part being underscored [italicized]:

$700.80.] *Quincy, Ills.*, June 1, 1876.

On demand, *Pay to the order of* First Nat'n' Bank seven hundred & $\frac{80}{100}$ *dollars.*

To Hall, Patterson & Co.,
Union Stock Yards, Chicago, Ills.
W. G. MELSON.

The rest of said drafts so identified by said witness Patterson, being 26 in number, bore different dates, between April 8th, 1876, and December 5th, 1876.

54 One of said drafts was in the words and figures following, to wit: the printed part being underscored [italicized]:

$1503.] *Quincy, Ills*, October 30, 1876.

Pay to the order of U. S. Penfield, cas', fifteen hundred & three dollars, a/c Joseph Hunalt.

To Hall, Patterson & Co.,
Stock Yards, Chicago.
(Signed) W. G. MELSON.

Several of said drafts differed from the above only in the dates & amounts, and in the name after the "a/c."

Another of said drafts was in the words and figures following, to wit: the printed part being underscored [italicized]:

$1267.00.] *Quincy, Ills.*, April 8th, 1876.

Pay to the order of U. S. Penfield, cash., twelve hundred & sixty-seven *dollars*, a/c 2 cars cattle.
To Hall, Patterson & Co.,
Stock Yards, Chicago, Ills.
(Signed) W. G. MELSON.

Others of said drafts differed from the above only in the dates & amounts & the number of car loads & kind of stock.

Of a third class of said drafts the following is a sample:

55 $1001.50.] *Quincy, Ills.*, April 8th, 1876.

Pay to the order of U. S. Penfield, cash., one thousand one & 50/100 dollars, a/c S. C. Tooley, 3 cars stock.
To Hall, Patterson & Co.,
Stock Yards, Chicago.
W. G. MELSON.

A number of said drafts differed from the above only in the date & amount thereof, and the name and number of cars after the "a/c."

Each of said drafts had the following endorsement on it:

Pay E. S. Stickney, cash., or order for collection, account of First National Bank of Quincy, Ill.
(Signed) U. S. PENFIELD, *Cash.*

The plaintiffs then rested.

The defendant, to maintain the issues on its part, then put Uri S. Penfield on the stand as a witness, and after he had been sworn, proved by him that he then was and ever since the organization of the defendant bank, in 1864, had been its cashier; that he received a despatch from Hall, Patterson & Co. inquiring about stock, after a letter had been received by him at Quincy, Illinois, from the Stock Yards
56 Bank at Chicago, informing him that the two drafts in evidence, dated Dec. 7th, 1876, had been paid.

The witness testified that he replied by telegram, saying he knew nothing about the stock; that he said nothing in said telegram about stock going by way of Hannibal, as he never had any knowledge of stock running by way of Hannibal; & *and* that of the drafts identified by Frank D. Patterson as filled out in his handwriting, all but one was filled out by him, and that all such so filled out were signed by said W. G. Melson in his presence. The defendant then proved by said witness that when said Melson wanted to draw a draft, he, not being a ready writer, would come to the bank & tell the cashier or some teller of the bank the sum he wanted to draw for, and what he wanted written on the face of the draft; that as to all said drafts so filled out by witness, whatever was written by him, said Penfield, on the face of them, or any of them, was so written at the request & dictation of said Melson, and that he, Penfield, only acted as Melson's amanuensis in filling out said drafts;
57 and that the practice as to the drafts above mentioned was true of all other drafts of earlier date than April 8th, 1876, which had been drawn by said Melson on Hall, Patterson & Co.; that whatever memorandum as to stock appeared on any of them was put there by the direction & request of said Melson; that neither the defendant bank, nor witness, its cashier, ever received any reply to the letter written by witness to Hall, Patterson & Co., in evidence, dated January 17th, 1876; that the defendant bank was not, nor was witness, its cashier, ever

informed in any way that the firm of Hall, Patterson & Co., as constituted prior or subsequently to April 1st, 1876, relied upon the defendant or its cashier taking shipping bills or bills of lading; that witness never, between January 15th, 1876, and the 12th of December, 1876, met personally, or had any conversation with either of the plaintiffs in this suit; that from the time of writing said letter, dated January 17th, 1876, till the receipt of the telegram in December, 1876, concerning stock, no correspondence of any kind passed between Hall, Patterson & Co., or any one or more of said plaintiffs and the defendant bank, or wit-
58 ness, its cashier, or any of its officers.

That no notice of the change in the copartnership of Hall, Patterson & Co. on April 1st, 1876, was ever brought to the defendant bank; & said bank never, prior to the payment by the firm of Hall, Patterson & Co. of the two drafts dated December 7th, 1876, in evidence, had any knowledge or information that said change had been made; that said two last-named drafts were acquired in the usual course of business; that witness paid Melson full value for each of them; that only discount made on either of them was exchange on Chicago; that for the $2,004 draft Melson got $2,000 cash, and for the $2,505 draft said Melson received $2,500; that the location of the stock yards at Quincy was over a half mile from the defendant's bank, and considerably outside the business portion of the said city of Quincy, & down the bluff—down along the river; that witness had no knowledge that said Melson had not shipped, and did not intend to ship, any stock to the plaintiffs in this suit out of which they could reimburse themselves for paying the
59 two drafts in evidence, dated December 7th, 1876; that he, said Penfield, did not know, during the year 1876, what Melson's pecuniary condition was; that witness had never had any reason to inquire about it, & did not know whether he was responsible or irresponsible, and knew but little about said Melson's reputation as to being a man of means; that his understanding as to said Melson during 1876 was that he was represented to witness as being a farmer, and witness' impression was he had some means, but that the drafts discounted were not discounted on the strength of Melson's responsibility, and witness had not learned anything about Melson's responsibility at the time the drafts, dated December 7th, 1876, were drawn; that witness had no knowledge as to whether or not there was or not stock to correspond with the memoranda on said two last-named drafts; and the said defendant, by its attorneys, then asked said witness—

Did you collude with said Melson in any way?

(To which said question said plaintiffs objected on the ground of irrelevancy & incompetency, and the defendants then offered to prove
60 by said Penfield that he had never colluded with said Melson in any way, and had never, knowingly, done anything to deceive the plaintiffs in this suit in anything connected with said two drafts last named, or any others drawn by said Melson and cashed by the defendant bank, but the said plaintiffs objected to the introduction of said evidence for its irrelevancy & incompetency, and the court sustained said objection and refused to allow the defendant to make proof of the evidence so objected to to the jury, to which decision & opinion of the court in sustaining said objection of plaintiffs and refusing to allow the defendant to give in said evidence to the jury, the defendant, by its attorneys, then and there, at the time of said decision being made, excepted.)

The defendant then proved by said witness that said Melson had never been a depositor of said defendant bank, and that he had only been

known at said bank as the agent of Hall, Patterson & Co., and that said bank had had no business with him at any time except as agent of, and in connection with, the business of Hall, Patterson & Co.

61 The defendant then proved by this witness that six sight drafts had been drawn at different times during March, 1876, & four at different times during February, 1876, by said Melson on Hall, Patterson & Co., which had been cashed by the defendant & paid by the drawees respectively on presentation; that during January, 1876, sight drafts were drawn of the following dates and amounts by said Melson on Hall, Patterson & Co., & cashed by the defendant bank:

One, dated	January	4,	1876,	for		$125
" other dated	January	4,	1876,	for		$125
" "	"	14,	"	"		$2,631 05
" "	"	27,	"	"		$2,663 00
" "	"	31,	"	"		$1,974 50

And all except the first one of said five last-named drafts were paid by the drawees on presentation, & that the first one of said drafts came back protested for non-payment; that all of the drafts drawn during January, February, & March, 1876, as aforesaid, were payable to the order of the defendant, or witness, as its cashier, and were filled up in the same way by witness, & had similar memoranda as those in evidence, dated subsequently to April 1st, 1876, and that witness,

62 as defendant's cashier, never heard, or knew, and had never been informed, that the firm of Hall, Patterson & Co., as constituted prior to April 1st, 1876, had been changed by the taking in of plaintiffs Greer and Frazee, or in any other way, and that by "shipping bill," in his letter of January 17, 1876, in evidence, he meant bill of lading.

Witness then testified that the conversation between him and & Frank D. Patterson, at the bank, when the latter came to see witness about the loss after the payment of said drafts dated December 7th, 1876, was as follows:

I said to said Patterson, "This is a matter I have no authority to settle; it will be referred to the directors of the bank, & when they get the opinion of their attorney, I will forward it." I do not think I expressed any conviction or promised anything in the way of payment. It was a matter to be referred to the attorneys, & on their decision the directors would direct me what to do.

The further testimony of this witness proved that between the time of the return of the protested draft of $125, dated January 4th, 1876, and the 14th of January, 1876, the defendant had refused to cash

63 any drafts of said Melson on Hall, Patterson & Co.; that witness, to accommodate the owner of the stock, cashed the draft of the 14th of January, 1867, and shipped the stock in his own name, consigned to Hall, Patterson & Co., to be sold for his, witness's, own account; that witness sent the draft of January 14th, 1876, with a memorandum of the superintendent of the Quincy stock-yards attached, showing the shipment.

Defendant then offered to prove by this witness that, owing to the unwillingness of the bank to be at the trouble of ascertaining, for its protection, whether drafts were drawn upon consignments, the defendant bank, after the receipt of the letter of Hall, Patterson & Co. dated January 15, 1876, refused to cash any more drafts of said Melson on Hall, Patterson & Co., and all employees of the said bank were directed to cash no more of said Melson's drafts on Hall, Patterson & Co., and the

business of said bank with said Melson and said Hall, Patterson & Co. was wholly discontinued by said defendant bank; but the counsel for the plaintiffs objected to the introduction of such evidence, on the
64 ground of its immateriality & incompetency, and thereupon the court sustained said objection and rejected the said evidence as inadmissible, to which opinion and decision of the court in sustaining said objection and rejecting said evidence the defendant, by its attorneys, then & there, at the time said decision was made, excepted.

The further testimony of this witness proved that the draft dated January 27th, 1876, was cashed before the defendant bank commenced cashing anew the drafts of said Melson, and was cashed by said bank on the strength of the endorsement of S. C. Tooley—which was made on said draft—and the same was then cashed for said Tooley's accommodation & on the strength of his said endorsement; that between the 27th of January, 1876, and the 31st day of January, 1876, the said Melson brought a letter signed Hall, Patterson & Co., in the handwriting of witness, Frank D. Patterson, as well the body of the letter as the signature, and that upon the faith of that letter the said bank commenced again to cash said Melson's drafts on Hall, Patterson & Co., as it had done prior to the receipt of the letter dated January 15th, 1876, in
65 evidence, & signed Hall, Patterson & Co.; that said Melson gave said letter to witness, and witness was about to file it away among other papers of the bank, but that said Melson earnestly solicited the return of the same to him, promising that if allowed to take it, he, Melson, would return it to witness.

That witness, at said Melson's urgent request, gave said letter last named to him, said Melson, and last saw it in his, said Melson's, hands; that said Melson never returned it; that said letter was delivered to witness in connection with the business of Hall, Patterson & Co. with said defendant bank, and while Melson was their agent; that since delivering said letter to said Melson said witness had never seen said letter, and that said bank, since the commencement of this suit, had searched most extensively & had searched everywhere where its officers thought or could learn said Melson was likely to be for said Melson, and had not been able to find him or said letter. It was proven that notice to produce said last-named letter had been duly served on the plaintiffs, and the same not being produced on the demand of the attorneys
66 for said defendant, the attorneys for said defendant then asked witness, "What were the contents of said letter?" and offered to prove by said witness that said letter was dated about January 28th, 1876, and was addressed "to all whom it may concern," and certified that said Melson was the agent of Hall, Patterson & Co. for Quincy & North Missouri, and that, as such agent, said Melson was authorized to draw sight drafts on said Hall, Patterson & Co. generally, and that all drafts drawn by him on them during 1876 would be paid by them; but the attorneys for the plaintiffs objected to the introduction of said evidence, on the ground that the foundation for proving the contents of said letter had not been sufficiently laid. Thereupon the court stated, as his opinion, that proof not having been made that said letter had been destroyed on this trial, the said evidence was not admissible, and rejected said evidence; to which opinion & decision of the court, in rejecting said evidence, the defendant, by its attorneys, then and there excepted.

The attorneys for the defendant then offered to prove by said Penfield that he had no intention by writing the letter of January 17th, 1876, or by anything therein contained, of contracting to do anything to protect

the interest of Hall, Patterson & Co., to whom said letter was
67 addressed, in any way, and that by using the words shall require shipping bills in that letter, he simply meant to indicate what he expected to have to do for the bank's protection, and nobody's else protection; but the attorneys for the plaintiffs objected to the introduction of said last-mentioned evidence on the ground of its irrelevancy & incompetency, and the court thereupon sustained said objection and rejected said last-named evidence; to which decision and opinion of the court, in sustaining said last-mentioned objection and in rejecting said last-mentioned evidence, the defendant, by its attorneys, then & there excepted.

The defendant, by its attorneys, then offered to prove that the defendant bank had not, nor had U S. Penfield, its cashier, ever been requested by any one or more of the plaintiffs in this suit, or by any one acting on their or either of their behalf, to take shipping bills, or bills of lading; but the plaintiffs objected to said last-named evidence, on the ground of its irrelevancy & incompetency, and the court sustained said last-named objection and rejected said last-named evidence; to which opinion
68 and decision of the court, in sustaining said last-named objection & in rejecting said last-named evidence, the defendant, by its attorneys, then & there excepted.

The defendant by its attorneys then offered to prove that it was a custom, long continued and well known, among banks at Quincy, Illinois, that when a draft is drawn against a shipment of stock, the bill of lading representing the stock is attached to & sent forward with the draft drawn against it; but the plaintiffs by their attorneys objected to said last named evidence as being irrelevant and incompetent, and the court thereupon sustained said last named objection and rejected said last named evidence, to which decision & opinion of the court in sustaining said last named objection & in rejecting said last named evidence the defendant by its attorneys then & there excepted.

The defendant by its attorneys then offered to prove that the said bank had not at any time prior to January 15th, 1876, nor prior to said date had U. S. Penfield, its cashier, exercised any agency for or stood in the position of protecting the interest of Hall, Patterson & Co.;
69 but the plaintiffs by their attorneys objected to the introduction of said last named evidence on the ground of its irrelevancy, and the court thereupon sustained said objection and rejected said last named evidence, to which opinion and decision of the court in sustaining said last named objection & rejecting said last named evidence the defendant by its attorneys then & there excepted.

The defendant by its attorneys then, after proof of its execution, offered in evidence a letter from Hall, Patterson & Co., in the words & figures following, to wit:

CHICAGO, A. 16, 1875.

U. S. PENFIELD,
Quincy, Ill.:

Our credit to Melson is only intended to cover drafts on stock in transit or about to be shipped from Quincy, as we don't think advisable to advance money to buy stock on in the country.

Yours, truly,

HALL, PATTERSON & CO.

(To the introduction of which said evidence & letter in evidence the plaintiffs by its attorneys at the time said evidence was offered,
70 and said letter was offered, objected, for the reason that the facts

having occurred & said letter having been written prior to January 15th, 1876, was irrelevant in this suit, and the court sustained said objection & rejected said evidence & said letter, to which decision & opinion of the court, in rejecting said evidence and said letter, the defendant by its attorneys at the time said evidence and said letter were respectively rejected then & there excepted.)

The defendant by its attorneys then offered to prove that said last named letter was revoked by the letter next hereinafter mentioned, and thereupon offered, after proper proof of the signature, a letter of Hall, Patterson & Co., in the words and figures following, to wit:

CHICAGO, 11, 5 1875.

U. S. PENFIELD,
Cash. 1st National, Quincy, Ill.:

You can allow our agent, W. G. Melson, to draw on us at three days' sight, & we will honor his drafts.

He wants the money to advance on stock down the R. R.

71 Yours truly,

HALL, PATTERSON & CO.

(But the plaintiffs by its attorneys thereupon objected to the introduction of said last named letter in evidence, because having occurred prior to January 15th, 1876, it was irrelevant in this suit, and the court thereupon sustained said last mentioned objection & rejected last named evidence, to which decision & opinion of the court in sustaining said last named objection & rejecting said last named letter the defendant by its attorneys then & there excepted.)

The defendants by its attorneys then, after due proof of signature, offered in evidence a letter of U. S. Penfield, cash., in the words & figures following, to wit:

JAN'Y 13TH, 1876.

Messrs. HALL, PATTERSON & CO.,
Chicago, Ills.:

I have in hand W. G. Melson's dr'ft on you, dated Jan'y 4th, $125, protested and returned for non-payment.

This dr'ft was given for balance due on shipment of stock, he
72 having my check for several hundred dollars and paid for the stock in my presence. I would like to hear from you. I don't see how you can go back of the letter of credit I hold from you. I know nothing about this man Melson, nor have I seen him since return of the dratt.

Very truly, yours,

U. S. PENFIELD, *Cash.*

Defendant by its attorneys, after due proof of signature, offered in evidence a letter in the words & figures following, to wit:

JAN'Y 14TH, 1876.

Messrs. HALL, PATTERSON & CO.,
Chicago:

I have this day cashed Melson's dr'ft endorsed by Joseph Hunalt on you for $2,631.05 on 3 cars hogs & one car cattle—will be shipped in the morning as per memorandum of supt. stock yards attached to the dr'ft. This stock is shipped for my a/c on payment of the d'f't; you will ren-

der ⅜ & forward balance proceeds to Joseph Hunalt, Clarence, Mo. I am at a loss to know what to make of the return of Melson's protested d'f't for 125, your ag't, and we holding your letter of credit,
73 and no explanation. For this reason have had stock shipped in my name.

Yours,

U. S. PENFIELD, *Cash.*

(To the introduction of which two last named letters in evidence the plaintiffs by their attorneys, at the time the same were severally offered, objected on the ground of their irrelevancy, and the court thereupon sustained said objection to each of said letters and rejected the same as evidence at the time the same were respectively introduced & offered in evidence, to which opinion and decision of the court in rejecting said two last named respective letters the defendants then & there, at the time each was rejected, excepted.)

The defendant then proved by said Penfield that the letter of January 15th, 1876, in evidence, was the only reply ever received to said two last named letters; that after the letter of January 17th, 1876, in evidence, drafts of said Melson were cashed on Hall, Patterson & Co. to the amount of nearly $5,000.00, and that this was done without any information as to any change in the firm of Hall, Patterson & Co.

74 On cross-examination said Penfield testified certain of the drafts shown witness Patterson, & not in his (Penfield's) handwriting, were in the teller's of the defendant bank handwriting; and that witness had no bills of lading with any of them and didn't know when the drafts were cashed whether stock was in transit or not, and had not required shipping bills to be produced; never had shipping bills or bills of lading with any draft drawn by Melson prior to January 17th, 1876.

Did not get any notice from the Stock Yards Bank by telegraph about the two drafts of date December 7th, 1876, not being paid. If these drafts left Quincy evening of December 7th, 1876, they would be in Chicago early next morning in the usual course of the mail. It is not the custom to telegraph a draft is not paid unless the Stock Yards Bank is specially requested. My bank received no telegram telling me the draft for $125, January 4th, 1876, was protested. Never informed Hall, Patterson & Co. I was cashing drafts without requiring shipping bills & without knowing whether stock was in transit or not. The con-
75 tents of the drafts filled up by the tellers I might or might not have known of. Prior to January 17th, 1876, witness might have occasionally asked Melson a question about his business, but as a rule questions were not asked of agents as to whether stock is in transit when they draw drafts. It is understood between the bank & every stock agent that no drafts are to be drawn unless stock is in transit, but his word is taken that the stock is in transit. The only draft ever drawn by Melson I ever had shipping bill for was that dated January 14th, 1876.

Defendant then offered one Noah Boyer as a witness, who testified, after being sworn, that he had known Melson and frequently came in contact with him; that he knew what he did in Quincy & North Missouri as agent of Hall, Patterson & Co.; that witness was employed by a rival stock firm; that Melson solicited consignments in North Missouri for his house; and to secure stock, while witness had never seen him advance money, he had heard him offer to do so.

Being asked what act Melson did at Quincy during 1876, as agent of Hall, Patterson & Co., witness said parties often came into Quincy

76 with their stock unconsigned to any one. Melson would try to get the owners to consign it to his firm. If he could not get such stock consigned without making advances, he would make advances to the owners at Quincy. Sometimes he would buy such stock right out at Quincy for the sake of getting it consigned to his firm. He often released stock during 1876 at Quincy.

Such stock would be put on the train in North Missouri & be consigned there to Hall, Patterson & Co. The owner would come along with it, & Melson & the owner would think it could be sold at Quincy as favorably as to carry it on to Chicago. The railroad company would not give up the consignment and release the stock without consent of the consignee, Hall, Patterson & Co.

That consent always came through Melson as their agent. The stock so released Melson would sell at Quincy, take the money & settle with the owner for his part of the proceeds.

The defendant, by its attorneys, then offered to prove that said Melson, during 1876 & down to December, 1876, at Quincy, exercised all the authority about the business of Hall, Patterson & Co., with the
77 knowledge of the defendant, that said Hall, Patterson & Co. or any member of said firm could have done themselves if personally present in Quincy; to which last-named evidence the plaintiffs, by their attorneys, thereupon objected on the ground of its irrelevancy and incompetency, and the court thereupon sustained said last-named objection & rejected said last-named evidence, to which decision & opinion of the court in sustaining said last-named objection & rejecting said last-named evidence, the defendant, by its attorneys, then & there excepted.

The defendant, by its attorneys, then offered to prove that there was during the year 1876, a custom among all persons doing business at the Chicago stock-yards, a custom of long standing & known to & observed by the plaintiffs in this suit, that the drafts of agents are paid by the employer without reference to bills of lading, and without requiring bills of lading to accompany his drafts, but that where the person employing an agent relies not upon his agent but the consignment of stock for his security, that the draft is required to be accompanied by the bill of lading representing the consignment against which
78 the draft is drawn; to the introduction of which last-named evidence the plaintiffs, by their attorneys, thereupon objected on the ground of its irrelevancy and incompetency, and the court thereupon sustained said last-named objection and rejected said last-named evidence, to which decision & opinion of the court in rejecting said last-named evidence the defendant, by its attorneys, then & there excepted.

The defendant, by its attorneys, then offered to prove that the plaintiffs in this suit, in the conduct of their business during 1876, when they employed an agent to facilitate their business, paid such agent's drafts without reference to bills of lading, but where their reliance was not upon the agent but upon the consignment, the bill of lading representing the consignment was, during 1876, required by said plaintiffs to accompany the draft drawn against the same; to the introduction of which evidence the plaintiffs, by their attorneys, objected on the ground of its irrelevancy, & the court sustained said last-named objection & rejected said last-named evidence, to which decision of the court in rejecting said last-named evidence the defendant, by its attorneys, then &
79 there excepted.

The defendant then, after due proof of its execution, offered a letter of said Melson in evidence & proved its receipt by Hall, Patterson & Co., in the words and figures following:

QUINCY, *January 27th*, 1876.

HALL, PATTERSON & COMPANY,
Chicago Illinois:

GENTLEMEN: I sent you two loads of hogs yesterday belonging to Mr. James H. Gough, of Shelbina, Missouri. He wanted to draw on them, but when we went to the bank Mr. Penfield was not disposed to advance for the reason that he was instructed by your letter that my letter of credit was thereby cancelled; so Mr. Gough was disappointed, and I, of course, don't feel altogether right. The same thing occurred again today. Hunalt sent his hogs down by S. C. Tooley. He wanted to draw. I was out, & Penfield, knowing Tooley, let him have the money—two thousand dollars. I don't encourage advancing money at all, but when my customers come and can't furnish them, some other agent will, and I lose him; so if you don't intend countermanding your letter to Penfield and giving me a show, as you agreed to, please inform me, and I will look for another job. Please send Gough's returns to Shelbina, and Hunalt's to Clarence, Missouri. Don't delay returns, as that is important. Please let me hear from you by return mail.

Yours, &c.,

W. G. MELSON.

The defendant rested, and the plaintiffs then put each of the five plaintiffs on the stand, & each testified that he had never agreed with Melson to make any change in the letter of January 15th, 1876, and that he had never written any letter revoking or changing the letter of January 15th, 1876, and plaintiff, Frazee, being asked about an account of sales rendered by Hall, Patterson & Co. to said Melson, dated March 27, 1876, answered:

I can't say positively that I remember the transaction at this time. He was buying stock in Quincy every few days, and my best recollection is this was a load of hogs bought in Quincy and left with me for sale; the stock didn't sell for enough to pay the draft Melson had drawn against it on Hall, Patterson & Co., and the account shows balance against him.

Plaintiff Hall was then asked the following question: Did you ever in any way authorize said Melson, after January 17th, 1876, & during said year, to draw drafts on Hall, Patterson & Co., except upon actual shipments in transit?

(To which question & the answering thereof the defendants by their attorneys objected, for the reason that that was a question to be determined by the jury from all the evidence in the case, and therefore not a question for the witness to express his conclusions upon; but the court overruled said objection and allowed the said last named question to be answered, to which opinion and decision of the court in overruling said objection & allowing said question to be answered the defendant by its attorneys then and there excepted.)

Said witness Hall answered said question as follows:

I never did.

Each of the plaintiffs, other than said Hall, was asked the same question under like objection, & under like exception was allowed to answer the same, and each of said plaintiffs, other than Hall, answered said question as follows:

I never did, and although Melson requested me to give him power to draw drafts generally, I refused to do so.

The plaintiffs then rested.

The foregoing evidence is all the evidence offered by both the plaintiffs & the defendant upon the trial of said cause.

The defendant by its attorneys then moved the court to instruct the jury as follows:

That the gravamen of the plaintiffs' declaration in this case is the fraudulent conduct of the defendant's cashier in reference to and in connection with the two drafts in evidence of date December 7th, 1876. Said cashier is charged with writing the body of said drafts with the design of deceiving the plaintiffs, and with putting memoranda thereon with the knowledge that the said memoranda were false and likely to mislead the plaintiffs, and were calculated to deceive the plaintiffs.

83 The said cashier is further charged with knowing when he discounted said two drafts of December 7th, 1876, that Melson had never procured any shipping bills for the hogs, cattle, and stock referred to in said two last mentioned drafts or any portion thereof, and that he, the said Melson, had no hogs, cattle, stock, or other property from the proceeds of which the plaintiffs might be reimbursed for paying said two drafts, either in whole or in part, and with further knowing that said Melson had not shipped and did not intend to ship any cattle, hogs, or stock, or any other property of value to said plaintiffs, from the proceeds of which, they, the said plaintiffs, might reimburse themselves for paying said drafts, and with knowing that if said plaintiffs should pay said drafts without security for reimbursement therefor, the plaintiff would lose the whole sum advanced therefor.

These allegations are material allegations in this case, and the evidence before the jury does not sustain them, and the verdict of the jury should be for the defendant; but the court refused to give said last-named instruction to the jury; to which decision & opinion of the court in refusing to give said last-named instruction to the jury the de-

84 fendant, by its attorneys, then & there, at the time of its refusal, excepted.

The defendant, by its attorney, further moved the court to instruct the jury as follows:

The plaintiffs' declaration alleges the letter of January 15th, 1876, in evidence, to have been written by the plaintiffs in this suit, and the letter of January 17, 1876, signed U. S. Penfield, cashier, and in evidence, to have been addressed to the plaintiffs in this suit. These allegations are not sustained by the evidence in this case, and for the variance between said allegations and said evidence the plaintiffs cannot recover in this case, and the verdict of the jury should be for the defendant in this case; but the court refused to give said last named instruction to the jury; to which decision & opinion of the court in refusing to give said last-named instruction to the jury, the defend , by its attorneys, then & there at the time of said refusal excepted.

The defendants by their attorneys then further moved the court to instruct the jury as follows:

85 The form of action chosen by the plaintiffs in this case is an action upon the case. The plaintiffs cannot recover in said form of action, upon the evidence before the jury in this case, and the verdict of the jury should be for the defendant; but the court refused to give said last-named instruction to the jury; to which opinion and decision of the court in refusing to give said last-named instruction the defendant, by its attorneys, then & there at the time of said refusal excepted.

The defendant by its attorneys then further moved the court to instruct the jury as follows:

It is proven to the jury that during the months of January, A. D. 1876, and at the time the respective letters in evidence dated January 15th, 1876, and January 17th, 1876, were respectively written and received, the firm of Hall, Patterson & Co. was composed of S. Frank Hall, Augustus L. Patterson, and Frank D. Patterson, and that on April 1st, 1876, said firm was changed so as to consist of the plaintiffs in this suit. The jury are instructed that for any breach of any agreement resulting from said two last named letters the plaintiffs in
86 this case, owing to said change of firm, cannot recover, and the verdict of jury should be for the defendant; but the court refused to give said last named instruction; to which decision and opinion of the court in refusing said last instruction, the defendant, by its attorneys, then & there at the time of its refusal excepted.

The defendant, by its attorneys, then moved the court to give the following instruction to the jury:

There is no evidence before the jury sufficient to show that the cashier of the defendant bank was authorized to bind the defendant to cash no drafts of said Melson unless based upon actual consignments, and in the absence of evidence to prove said fact, the cashier of the defendant would not be authorized to bind the bank in such a way. There being no evidence such authority, the verdict of the jury should be for the defendant.

But the court refused to give said last named instruction to the jury, to which opinion & decision of the court, in refusing to give said last named instruction to the jury, the defendant, by its attorneys,
87 then & there at the time of its refusal excepted.

The defendant, by its attorneys, then moved the court to give the following instruction to the jury:

Upon the evidence before the jury in this case the plaintiffs cannot recover, and the jury should find for the defendant.

But the court refused to give said last named instruction to the jury; to which opinion & decision of the court in refusing to give said last named instruction the defendant, by its attorneys, then & there excepted.

The foregoing instructions and each of them were asked by counsel for the said defendant, and refused by the court before the charge hereinafter mentioned was given to the jury in the case, and before the jury retired to consider as to their verdict.

The court then charged the jury as follows:

From the course this case has taken I have very little to say to the jury. The letter of the plaintiffs of the 15th of January, 1876, and the answer to it by the cashier of the bank on the 17th of January,
88 1876, have been read to the jury. I state to the jury that those two letters constitute a binding contract between the plaintiffs and the defendant, by which the defendant agreed not to cash any drafts drawn by Melson on the plaintiffs unless they were based on actual consignments of produce; the plaintiffs living at Chicago, where this stock was to be received and where the drafts were to be presented and paid, and the defendant living at Quincy, where the stock was to be shipped and where the drafts were to be drawn and cashed.

Now, under that arrangement created by the letters of the 15th & 17th of January, in evidence before you, it was the duty of the defendant, before it cashed a draft, to ascertain that it was based upon an actual con-

signment of produce to the plaintiffs, and if it cashed any drafts that were not based upon consignment of property to the plaintiffs, and the plaintiffs sustained any loss by reason of such failure, the bank will be responsible to the plaintiffs. But it is insisted by the defendant that the arrangement of the 15th and 17th of January was changed afterwards by the agreement of the parties. That is to be determined
89 from all the facts and circumstances in the case. If the jury should come to the conclusion from the evidence before them that the contract was afterwards changed, the plaintiff in this case would not be entitled to recover. But if the jury should come to the conclusion that the contract created by the letters of the 15th & 17th of January was not changed, but continued in force until these two drafts in question were drawn, and if those drafts were not actually drawn upon consignment of property to the plaintiffs, then if the *plaintiffs* paid the drafts, the plaintiffs would be entitled to recover any damage which might be sustained by such payment, there being no consignment to meet the draft. If, as it appears in this case, the drawer of the drafts, Melson, was worthless, then it would follow that the plaintiffs would be entitled to recover the amount from the defendant.

My opinion is that, under this arrangement of the 15th of January, it was the duty of the cashier before he cashed a draft to ascertain that it was based upon an actual shipment, and the plaintiffs had a
90 right to conclude that all drafts drawn while that contract was in force were based upon actual shipments. The testimony of the witness Boyer as to the course of business down at the stock yards at Quincy does not tend to prove that there was any revocation of the letter of January 15th, 1876.

The said defendant, by its attorneys, objected to the following portion of said charge at the time said portion was given to the jury.

"The letter of the plaintiffs of the 15th of January and the answer to it by the cashier of the bank on the 17th of January have been read to the jury. I state to the jury that those two letters constitute a binding contract between the plaintiffs and the defendant, by which the defendant agreed not to cash any drafts drawn by Melson on the plaintiffs unless they were based on actual consignments of produce."

But the court stated its opinion that said portion of said charge was correct, and gave the same to the jury notwithstanding said objection of said defendant by its attorneys thereto; to which opinion and decision of the court in giving said last named portion of said charge to the jury the defendant, by its attorneys, then & there, at the time the same was so given to said jury, excepted.

91 The said defendant, by its attorneys, further objected to the following portion of said charge of the court at the time the same was given to the jury.

"Now, under that arrangement created by the said letters of the 15th & 17th of January, in evidence before you, it was the duty of the defendant, before it cashed a draft, to ascertain that it was based upon an actual consignment of produce to the plaintiffs, and if it cashed any drafts that were not based upon consignment of property to the plaintiffs and the plaintiffs sustained any loss by reason of such failure, the bank will be responsible to the plaintiffs."

But the court stated it as its opinion that said last-named portion of said charge was a correct statement of the law of the case, and, notwithstanding said objection of said defendant by its attorneys, gave said last named portion of said charge to the jury; to which opinion &

decision of the court, in giving said last named portion of said charge to the jury, the defendant, by its attorneys, then & there, at the time the same was so given, excepted.

92 The said defendant, by its attorneys, further objected to the following portion of said charge of the court at the time the same was given to the jury:

"If the jury should come to the conclusion that the contract created by the letters of the 15th & 17th of January was not changed, but continued in force until these two drafts in question were drawn, and if those drafts were not actually drawn upon consignment of property to the plaintiffs, then, if the plaintiffs paid the drafts, the plaintiffs would be entitled to recover any damage which might be sustained by such payment, there being no consignment to meet the draft; if, as it appears in this case, the drawer of the drafts, Melson, worthless, then I suppose it would follow that the plaintiffs would be entitled to recover the amount from the defendant."

But the court stated it as its opinion that said last named portion of said charge was a correct statement of the law, and notwithstanding said last named objection of said defendant, by its attorneys, the

93 court gave said last named portion of said charge to the jury; to which said opinion and decision of the court in giving said last named portion of said charge the defendant, by its attorneys, then & there, at the time the same was so given, excepted.

The said defendant, by its attorneys, further objected to the following portion of said charge of the court at the time the same was given to the jury:

"My opinion is that under this arrangement of the 15th of January it was the duty of the cashier, before he cashed a draft, to ascertain that it was based on an actual shipment, and the plaintiffs had a right to conclude that all drafts drawn while that contract was in force was based on actual shipments."

But the court stated it as its opinion that said last named portion of said charge correctly stated the law of this case, and notwithstanding said last named objection of said defendant, by its attorneys, gave the same to the jury; to which decision and opinion of the court in giving said last named portion of said charge to the jury the defendant, by its attorneys, then and there, at the time the same was so given, excepted.

94 The said defendant, by its attorneys, further objected to the following portion of said charge at the time the same was given:

"The testimony of the witness, Boyer, as to the course of business down at the stock-yards at Quincy, does not tend to prove that there was any revocation of the letter of January 15th, 1876."

But the court stated it as its opinion that said last named portion of said charge was a correct statement of the law, and notwithstanding said objection last named, gave the same to the jury; to which said decision & opinion of the court in giving said last named portion of said charge to the jury the defendant, by its attorneys, then & there, at the time the same was so given to said jury, excepted.

And the said court, upon the charge aforesaid and the aforesaid evidence, submitted the issues to the jury impanelled & sworn in the cause to try said issues, and said jury then & there found their verdict for the plaintiff and against the said defendant for the sum of five thousand one hundred and two dollars and sixty-three cents, and immediately upon

95 the rendition of said verdict by said jury the defendant, by its attorneys, moved the court to set aside the said verdict and for a

new trial of said cause, which last named motion the court afterwards, at said January, 1879, term of said circuit court, and on the 25th day of February, A. D. 1879, overruled, and rendered judgment against said defendant on said verdict; to which decision and opinion of the court in overruling said motion for a new trial and rendering judgment on said verdict the defendant, by its attorneys, then & there excepted.

And because none of the matters aforesaid and none of the said exceptions so offered and made and taken to the several opinions and decisions of the court hereinbefore mentioned appear of record, the counsel for said defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the undersigned, the said district judge holding said circuit court, before whom said cause was tried, and made part of the record, and the same is accordingly done.

[L. S.] S. H. TREAT.

96 (Endorsed:) Filed February 25th, 1879. J. A. Jones, clerk.

And afterwards, to wit, on the 11th day of April, in the year last aforesaid, came said defendant, by its attorneys, and filed in said clerk's office its bond on writ of error to Supreme Court of the United States, which said bond is in the words and figures following, to wit:

Bond on writ of error.

Supreme Court of the United States.

S. FRANK HALL, FRANK D. PATTERSON, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer
vs.
THE FIRST NATIONAL BANK OF QUINCY, Illinois.

Know all men by these presents that The First National Bank of Quincy, Illinois, a corporation created and existing under and by virtue of the laws of the United States, as principal, and James D. Morgan and Samuel E. Seger, of the city of Quincy, in the county of Adams, and State of Illinois, as securities, are held and firmly bound unto
97 S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co., in the sum of seven thousand dollars, to be paid to said S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing said firm; to which payment, well and truly to be made, we bind ourselves, our successors, executors, administrators, and heirs, jointly, severally, firmly by these presents. In witness whereof the said principal has caused these presents to be signed by its president and cashier, and its corporate seal to be affixed, the same being done pursuant to a vote of its directors, and the said sureties have hereunto set their hands and seals this 11th day of April, A. D. 1879.

The condition of the above obligation is such that, whereas the said S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing said firm, did, in the circuit court of the United States for the southern district of Illinois, at the January, A. D. 1879 term thereof, recover a judgment against the said

"The First National Bank of Quincy, Illinois," to reverse which judgment the above-named "The First National Bank of Quincy, Illinois," hath prosecuted a writ of error to the Supreme Court of the
98 United States.

Now, therefore, if the said "The First National Bank of Quincy, Illinois," shall prosecute its said writ of error to effect and answer all costs and damages, including just damages for delay, and fully pay off and discharge said judgment, if the said "The First National Bank of Quincy, Illinois," shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

{ SEAL OF FIRST NAT'L BANK, QUINCY. }

F. W. MEYER, *Pres't.*
U. S. PENFIELD, *Cash.*
JAMES D. MORGAN. [L. S.]
S. E. SEGER. [L. S.]

STATE OF ILLINOIS,
Adams County, ss:

James D. Morgan and Samuel E. Seger, the sureties in the foregoing bond, being duly & severally sworn, say, and each for himself, says that he is a freeholder in said county of Adams, and is worth the sum of seven thousand dollars over and above all his debts, liabilities, and property exempt from execution.

JAMES D. MORGAN.
SAMUEL E. SEGER.

99 Subscribed & sworn to before me this 11th day of April, A. D. 1879.

Witness my hand & seal notarial, at Quincy, in said county.

[L. S.] ROBERT C. LOCKWOOD,
Notary Public.

Approved April 11th, 1879.

S. H. TREAT,
Dist. Judge.

(Endorsed:) Filed April 11th, 1879. J. A. Jones, clerk.

100 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States, within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause lately pending in said court, wherein S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, and Jefferson E. Greer, composing the firm of Hall, Patterson & Co. are plaintiffs, and The First National Bank of Quincy, Illinois, is defendant, as fully and completely as the same appear of file and of record in my said office.

Witness my hand and the seal of said court, at Springfield, in said district, this ninth day of May, A. D. 1879.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 768. The First National Bank of Quincy, Illinois, plaintiff in error, vs. S. Frank Hall, Frank D. Patterson, Augustus L. Patterson, Martin V. Frazee, & Jefferson E. Greer, as Hall, Patterson & Co. S. Illinois C. C. U. S. Filed 23rd June, 1879.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 768.

OCTOBER TERM, A. D. 1879.

THE FIRST NATIONAL BANK OF QUINCY, ILLINOIS, PLAINTIFF IN ERROR,

vs.

S. FRANK HALL, FRANK D. PATTERSON, AUGUSTUS L. PATTERSON, MARTIN V. FRAZEE AND JEFFERSON E. GREER, PARTNERS, AS HALL, PATTERSON & CO, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Brief and Argument of Plaintiff in Error.

QUINCY, ILL:
CADOGAN & GARDNER, PRINTERS AND BINDERS.
1879.

IN THE

Supreme Court of the United States,

No. 768.

OCTOBER TERM, A. D. 1879.

THE FIRST NATIONAL BANK OF QUINCY, ILLINOIS, PLAINTIFF IN ERROR,

vs.

S. FRANK HALL, FRANK D. PATTERSON, AUGUSTUS L. PATTERSON, MARTIN V. FRAZEE AND JEFFERSON E. GREER, PARTNERS, AS HALL, PATTERSON & CO., DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Brief and Argument of Plaintiff in Error.

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STATEMENT OF THE CASE.

Various are the attemps which have been made, to avoid the effect of the decisions of this Court upon the question, as to whether a drawee of a bill of exchange, who has paid the same under such a mistake of facts, as this record discloses, can sue the payee, to recover back the money so paid. We regard this case as but another effort in that direction.

A firm doing business under the name of Hall, Patterson & Co., and composed of S. Frank Hall, Frank D. Patterson, and Augustus L. Patterson—*three* of the five defendants in error—had existed during the years 1874, 1875, and up to April 1st, 1876. (Record p. 30). The business of said firm during said period, had been selling live stock on commission at the Union Stock Yards, at Chicago, Illinois, and in the prosecution of their business, said firm had employed agents to travel for them through various parts of the West, to obtain consignments of stock to them. (Record p. 31). The City of Quincy, Illinois, being looked upon by said firm as an important point for their business, they had had one William G. Melson, as their agent for said city of Quincy and North Missouri, during 1874, 1875, and up to April 1st, 1876, he having said Quincy for his headquarters during said time. (Record pp. 31 and 32.) The said Melson, in compliance with the regulations of the Stock Yards at Quincy, Illinois, as evidence of his authority to act as the agent of Hall, Patterson & Co., at said point, filed in the Quincy Stock Yards, about January 1st, 1876, a letter written by Hall, Patterson & Co., reading as follows:

"All drafts drawn upon us must have bill of lading attached, and not exceed two-thirds value of consignment.

S. F. HALL. F. D. PATTERSON. A. L. PATTERSON.

HALL, PATTERSON & CO.,

LIVE STOCK COMMISSION MERCHANTS,

UNION STOCK YARDS,

Chicago, Jan. 1st, 1876.

To whom it may Concern:

This is to certify that W. G. Melson is our authorized agent, Quincy, Ills. and North Missouri, for the year A. D. 1876.

HALL, PATTERSON & Co."

(Record p. 48.) A similarly worded letter had been filed at Quincy Stock Yards for the year 1875, and during all the time said Melson had acted as agent of said Hall, Patterson & Co., at said Quincy, there had been a similar letter to the one last aforesaid on file at Quincy Stock Yards, under which Melson had acted. (Record pp. 48 and 49.)

To secure consignments of cattle or stock at Quincy, Illinois, said Melson had found it necessary to make advances to cattle and stock owners at that point. These advances could only be gotten by arranging with some Bank at Quincy, Illinois, to cash his (said Melson's) drafts on

his principals, Hall, Patterson & Co. (Record p. 47.) The First National Bank, of Quincy, Illinois, the plaintiff in error, was during the years aforesaid, a National Bank, doing business at Quincy, Illinois, having for its cashier, one U. S. Penfield, and with that Bank, Hall, Patterson & Co., arranged to have Melson's drafts on them cashed. During the entire period of his agency, said Melson had been in the habit of getting his drafts on Hall, Patterson & Co. cashed by that Bank, and all drafts so cashed had been *sight* drafts (Record p 47.) Said Melson had never been a depositor at said Bank, and said Bank had never had any business with said Melson at any time, except as agent of, and in connection with the business of Hall, Patterson & Co. (Record p. 60.) Such being the relation between the said Melson and the said "The First National Bank of Quincy, Illinois," a draft of one hundred and twenty-five dollars, drawn by said Melson on Hall, Patterson & Co., was returned to said Bank unpaid, which led to some controversy between Hall, Patterson & Co., and the said Bank, by letter, (Record p. 32.), after which a letter was written by Hall, Patterson & Co., to U. S. Penfield, cashier of said Bank, on a sheet of paper having the following printed letter head:

"All drafts on us must have bills of lading attached, and not exceed two-thirds value of consignment."

S. F. HALL. F. D. PATTERSON. A. L. PATTERSON.

HALL, PATTERSON & CO.,

LIVE STOCK COMMISSION MERCHANTS,

UNION STOCK YARDS."

Said letter being as follows:

"*Chicago, Jan. 15th*, 1876.

U. S. PENFIELD, Cashier,

Quincy, Ill.:

DEAR SIR: Hereafter we will only pay drafts on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day, or the day after presented to us.

This letter will cancel all previous arrangement of letters of credit in reference to W. G. Melson. Please acknowledge receipt of this and oblige. Yours Respectfully,

HALL, PATTERSON & Co."

The Cashier of said Bank, the said Penfield, replied to said letter as follows:

"*Quincy, Ill., Jan.* 17, 1876.

Messrs. HALL, PATTERSON & Co.,

Chicago:

DEAR SIRS: Your favor 15th, received. I note what you say. We have never knowingly advanced Melson any money on stock to come in. Have always supposed it was here in transit. Have always taken his word. After this we shall require ship'g bill.

Very Truly Yours, U. S. PENFIELD,

Cashier."

(Record pp. 33, 34, 36.) No reply to this letter of the Cashier, dated January 17th, 1876, was ever made. (Record p. 57.)

After this correspondence, and on April 1st, 1876, S. Frank Hall, Frank D. Patterson, and Augustus L. Patterson, three of the defendants in error, who had until that date constituted the firm of Hall, Patterson & Co., took the other two defendants in error, Martin V. Frazee and Jefferson E. Greer, into partnership with them. (Record p. 30.) Frazee and Greer, the new members of the firm, had, prior to April 1st, 1876, been in the employ of the old firm of Hall, Patterson & Co., as clerks, and had known of the writing of the letter of January 15th, 1876, above set forth. (Record pp.31, 35.) After the change in the firm on April 1st, 1876, the five defendants in error continued to do business under the same firm name of Hall, Patterson & Co., until after this suit was begun. (Record pp. 30, 31.) The written authority above mentioned and set forth, filed in the Quincy Stock Yards on January 1st. 1876, was left there undisturbed after the change of firm, and no new one was filed there after said change. (Record p. 49.) Melson continued to act as agent of the new firm of Hall, Patterson & Co., from the time it was formed until after the happening of the loss, which we are about to mention. As such agent, he drew at different times between the date of the change of said firm (April 1st, 1876,) and the happening of said loss, thirty one drafts, all sight drafts, on Hall, Patterson & Co., which were cashed by the plaintiff in error, "The First National Bank," and paid by Hall, Patterson & Co. (Record p. 40.) The aggregate of the drafts so drawn by said Melson, and cashed by said Bank between the dates last aforesaid, was $50,000. (Record p. 73.) (We discover that the printed record erroneously shows only $5,000.) No letter of any kind passed and no personal interviews took place, after the writing of the aforesaid letter, dated January 17th, 1876, between the firm of Hall, Patterson & Co., or any member of said firm, and the defendant Bank, or its Cashier, or any of its officers. (Record pp. 51, 57, 58.) No knowledge or information of any change in the firm of Hall, Patterson & Co., was ever brought to the plaintiff in error, and all drafts cashed after April 1st, 1876, when said firm was changed, including those hereinafter mentioned, were cashed by said Bank without any knowledge or information on its part or the part of its Cashier, of any change in said firm. (Record pp. 58, 62, 73.)

On December 7th, 1876, said Melson drew two drafts on the firm of Hall, Patterson & Co., in the words and figures following, to-wit:

"$2,004.00. *Quincy, Ill's*, Dec. 7, *1876*.

Pay to the order of U. S. Penfield, Cas., two thousand and four *dollars*, a/c S. C. Tooley, 4 l'ds hogs & cattle.

(Signed) W. G. MELSON.

To Hall, Patterson & Co.,
Stock Yards, Chicago."

"$2,505. *Quincy, Ill's*, Dec. 7, *1876*.

Pay to the order of U. S. Penfield, Cas., twenty-five hundred & five *dollars*, a/c Jos. Hunneyle, 5 l'ds stock.

(Signed) W. G. MELSON.

To Hall, Patterson & Co.,
Stock Yards, Chicago, Ill's."

The said two drafts, were partly in print and partly in writing—the italicized parts being printed. (Record p. 38.) Each of them was cashed by the First National Bank, the plaintiff in error, on the day of

its date, the Bank paying Melson for the first of said two drafts the sum of $2,000.00 in cash, and for the other $2,500.00, the only discount being the exchange on Chicago, and acquiring the same in the usual course of business and in entire good faith. (Record p. 58.) By the term *ship'g bill*, in the letter of said Penfield, dated January 17th, 1876, to Hall, Patterson & Co., said Penfield testified, he meant bill of lading, (Record p. 62) and yet no bill of lading had ever been taking by the Bank, after the date of said letter of January 17th, 1876, and all of Melson's drafts, (numbering *thirty-one* after April 1st, and some ten or twelve between January 17th and April 1st, (Record pp. 40, 61), making in the aggregate about 43 drafts), had been paid on presentation by Hall, Patterson & Co., the drawees, without any shipping bills or bills of lading attached, or without their making any inquiry of the plaintiff in error, or its Cashier, concerning bills of lading. (Record pp. 50, 51.) When the two drafts dated December 7th, 1876, were cashed, Penfield, the Cashier of the plaintiff in error, had no knowledge as to whether they were drawn against stock or not. (Record p 59.) It was a rule at the Bank, one understood by every stock agent doing business there, that no stock agent was to draw a draft unless stock is in transit. Such being the rule, questions are not asked of agents, as a rule, when they draw drafts, if stock is in transit. Reliance is had in the agent that such is the case. (Record p. 75.) The two drafts of December 7th, 1876, were sent properly endorsed, by the plaintiff in error, to its correspondent, the Union Stock Yards Bank in Chicago, to be presented for payment. On December 9th, 1876, Hall, Patterson & Co., paid the two drafts last named, to said correspondent of plaintiff in error, (Record p. 39,) and it appears that no stock was ever received out of which Hall, Patterson & Co., the defendants in error, could reimburse themselves for having paid said drafts, and the whole of the sum paid by the defendants in error, on said drafts was lost to them.

To recover for this loss, the plaintiffs below, (the defendants in error), brought an action *in case* against the Bank, the plaintiff in error. (Record p. 5.) The Bank, the defendant below, filed a plea of the general issue, under which, in Illinois, any defense except limitations is admissible. (Record p. 20.) A trial was had before the Judge of the District Court of the United States for the Southern District of Illinois, holding Circuit Court. On trial of the issues, the jury found a verdict for the plaintiffs in the sum of *five thousand one hundred and two dollars* and sixty-three cents. The Bank moved for a new trial. The Court overruled the motion and rendered judgment against the Bank on the verdict. (Record pp. 27, 28.)

Out of the facts above set forth arise certain of the questions involved in this case, as follows:

What was the letter of Hall, Patterson & Co., dated January 15th, 1876, which notified the cashier of the Plaintiff in error, that they would only pay drafts of their agent Melson, when drawn on actual consignments?

Was it a mere notice to the bank of the extent of the authority of their agent, or an ordinary letter of credit conferring a conditional authority to draw, or was it a proposition or request, which, with the reply above set forth, dated January 17th, 1876, would make a contract?

If contract, what was it an agreement on the part of the bank to do?

If the letters dated January 15th, 1876, and the reply thereto, dated January 17th, 1876, could make a contract in any view of the case, can a Court say, as a matter of law, and without reference to the *intention of the bank to be bound*, that said letters make a contract binding on the bank to do any particular thing?

If said letters make a contract, how is it possible for a firm not in existence at the time the contract was made, to be sueing for a breach of it?

If the present firm of Hall, Patterson & Co., could under any circumstances sue for a breach of any contract, made with another firm, can a Court say *as a matter of law* on the facts in this record, that the said two letters made a contract between the defendants in error and the bank?

The Court instructed the jury, not merely that the two letters in question, as a matter of law, made a contract, but also, that as a matter of law, they made a contract between the Plaintiffs in the suit (the Defendants in error) and the bank, the Court's instructions being as follows:

"The letter of the Plaintiffs of the 15th of January, and the answer to it by the cashier of the bank on the 17th of January, have been read to the jury. I state to the jury that those two letters constitute a binding contract between *the Plaintiffs and the Defendant*, by which the Defendant agreed not to cash any drafts drawn by Melson on the Plaintiffs, unless they *were based on actual consignments of produce.*" (Record p. 90.)

The further instructions of the Court told the jury that if the bank cashed any drafts not based on actual consignment of property to the Plaintiffs, and the Plaintiffs sustained any loss by reason of such failure, the bank will be responsibe to the Plaintiffs. (Record p. 91.)

Additional questions grow out of the foregoing facts, in connection with the declaration filed below, some of which are the following:

Firstly. Was the letter of January 15th, 1876, written by the old firm of Hall, Patterson & Co., and the reply of Penfield, cashier, dated January 17th, 1876, admissible in evidence on the trial below under any circumstances?

Secondly. If a case could be made, in which said letters could become admissible in a suit by the present Plaintiffs, do the allegations of Plaintiffs' declaration make such a case?

Thirdly. Supposing the Plaintiffs below entitled to recover at all, could a recovery be had on the facts disclosed by the record in this case in an action of tort?

Fourthly. If, under any view of the case, a recovery could be had in tort, have the Defendants in error proven the allegations of their declaration so as to entitle them to recover under their declaration?

The last four questions will be better understood if we set forth in substance the allegations of that declaration.

After alleging the place and kind of business of the Plaintiffs below, the place and kind of business done by the bank, the insolvency of William G. Melson, and stating that Melson could never have borrowed from the Plaintiffs any sum of money without giving them ample security therefor, and that Melson had tried to induce said Plaintiffs to honor drafts drawn by him on them in favor of the Defendant bank, on account of live stock which he promised to ship to them, (Record pp. 6. 7.), the declaration sets forth in *haec verba*, the letter dated January 15th, 1876, of Hall, Patterson & Co. to U. S. Penfield, cashier, and the reply of said Penfield thereto, addressed to Hall, Patterson & Co., dated January 17th, 1876, alleging that the former letter was addressed to the Defendant bank through its cashier by the *Plaintiffs*, and that the latter one was *addressed to, and received by the Plaintiffs.*

The declaration then avers the receipt of said last letter by the *Plaintiffs* on January 18th, 1876; that they thereafter, while knowing Melson was worthless and to such an extent that they would not have honored his drafts without full security for so doing, yet they relying on a promise by the Defendant in their said letter contained, "*that it would not from and after the 17th day of January, A. D.* 1876, *advance any money to the said Melson on his drafts on the Plaintiffs, or accept the same for collection unless he, the said Melson, should first deliver to the Defendant shipping bills, showing a shipment of stock to the Plaintiffs sufficient in value to enable the Plaintiffs, from the proceeds thereof, to pay any such drafts*, did, prior to December 7th, A. D. 1876, accept and pay numerous drafts drawn on them by Melson in favor of the Defendants, and that until the committing of the grievances hereinafter named, stock always was shipped by Melson which reached Plaintiffs' place of business on the same day or the day after such drafts were presented to Plaintiffs for payment, from which Plaintiffs were enabled to realize money to indemnify themselves for paying such drafts. (Record pp. 9. 10.)

The declaration then contains and sets forth the following allegations which we understand to be the *gravamen* of their declaration:

"And the Plaintiffs further aver that, afterwards, to-wit: On the 7th day of December, A. D. 1876, at the district aforesaid, the said U. S. Penfield, as the cashier of the Defendant, prepared two drafts, which he caused to be signed by said Melson as drawer, upon the Plaintiffs (under their said firm name) directed to them at the stock yards in Chicago, by one of which drafts the said Melson purported to require the Plaintiffs to pay to the order of U. S. Penfield. cashier, two thousand and four dollars on account of S. C. Tuly's four loads of hogs and cattle, and by the other, to the order of the same payee, two thousand five hundred and five dollars on account of Jos. Hunnegle's five loads of stock, and the said Penfield was then and there the cashier of the Defendant, and well knew that the Plaintiff had before that time frequently received shipments of stock from the said Melson, which had been purchased from or through the said Tuly and the said Hunnegle, and would be likely to be deceived and misled by the memoranda upon said drafts indicating shipments of stock purchased from or through them, the said Tuly and Hunnegle, yet he, the said Penfield, as such cashier as aforesaid, colluding and conspring with the said Melson to deceive and defraud the Plaintiffs by inducing the Plaintiffs to pay the two last mentioned drafts, although he, the said Penfield, then and there well knew that the memoranda upon said drafts indicating a shipment of stock to the Plaintiffs, purchased from the said Tuly and Hunnegle, and from the proceeds of which the

Plaintiffs might be indemnified for paying such two last mentioned drafts, were false and calculated to deceive the Plaintiffs, and although he, the said cashier, then and there well knew that the said Melson had never procured any shipping bills from any common carrier or other person or corporation, for the hogs, cattle and stock referred to in said two last mentioned drafts or any portion thereof, and that he, the said Melson, had no hogs, cattle, stock, or other property from the proceeds of which the Plaintiffs might be reimbursed for paying the said two last mentioned drafts, either in whole or in part, and that he, the said Melson, had not shipped, and did not intend to ship any cattle, hogs, stock, or other property of value to the Plaintiffs from the proceeds of which the Plaintiffs might reimburse themselves, in any part, for paying such two last mentioned drafts, and that if the plaintiffs should pay such two drafts without security for reimbursement therefor they would lose the whole sum advanced for such payment, but wholly disregarding the promises and agreements in the said letter of said cashier contained, he, the said Penfield, as such cashier, omitted and neglected to require from the said Melson any shipping bills for the cattle, hogs and stock mentioned in the said drafts, although he then and there well knew that the Plaintiffs would not pay said two drafts or either of them, or any part thereof, if they knew at the time of such payment that he had not required the delivery to him of shipping bills for all the cattle, hogs and stock referred to in said two drafts before forwarding the same for collection from the Plaintiffs, but craftily and subtlely intending to aid the said Melson in deceiving and defrauding the Plaintiffs by inducing them to pay such drafts without any security for reimbursement therefor, and while relying upon and confiding in the aforesaid promises of him, the said cashier, and thereby to cause the Plaintiffs to suffer a loss of the whole amount so paid, he, the said Penfield, as such cashier as aforesaid, immediately after the preparation of such two drafts by him as aforesaid, forwarded the same to the Union Stock Yards Bank of Chicago, aforesaid, for collection on account of and for the credit of the Defendant." (Record pp. 10, 11, 12, 13.)

The declaration then avers, the presentment for payment of said last two named drafts at the place of business of the Plaintiffs, the payment of same by Plaintiffs, after finding from an examination of the same that the drafts had been prepared by the cashier of the bank, and believing from the memorandums on the drafts, that cattle, hogs and stock were in transit of sufficient value to enable Plaintiffs from the proceeds to reimburse themselves, and that the Defendant (the bank) had required shipping bills from Melson before discounting the drafts, and in reliance upon the promises contained in the letter of the bank's cashier dated January 17th, 1876. (Record p. 14.)

Then follow averments of the non-arrival of the hogs, cattle and stock referred to in the drafts, and none coming, Plaintiff becoming alarmed, began to make inquiries about Melson and the property pretended to be shipped to them and found that Melson had absconded for parts unknown; that the said last two drafts had been cashed without requiring shipping bills and that they had never received from Melson, or any body else, money or property to indemnify them for paying said drafts; that Plaintiffs, after diligent inquiries, were unable to find where Melson had absconded to, or where he was, and that he left no visible effects in the district where suit was brought, or elsewhere, from which Plaintiffs might realize the money paid on the drafts or any part of it, and that Melson was worthless and owed Plaintiffs the full amount of the drafts. (Record pp 15, 16, 17.)

The declaration then concludes as follows:

Wherefore the plaintiffs say that by reason of the premises aforesaid, and the sheer carelessness, negligence, fraudulent collusion, and conspiracy of the defendant as aforesaid, they have wholly lost the said sum of money so paid by them upon the said two last mentioned drafts—to their damage ten thousand dollars—wherefore they bring suit, &c. (Record p. 17.)

The question of the admissibility of the two letters above mentioned in this case arises on objection made at the trial to their introduction in evidence on two grounds:

Firstly. Because the correspondence was shown to be between other parties than the plaintiffs in the suit.

Secondly. Because of variance between the allegations of the declaration as to the persons between whom the correspondence took place and the evidence. (Record pp. 34, 35.)

The question of variance is also raised by an instruction to the effect that because of a variance between the allegations of the declaration in regard to the parties writing the one letter and the parties to whom the other was addressed, that plaintiff could not recover, which was refused by the Court, (Record p. 84) the Court charging the jury that the two letters made a binding contract between *the plaintiffs* and the Bank.

The question as to whether recovery could be had on the facts of the case is raised by an instruction requested by the Defendant below and refused by the Court, to the effect that Plaintiff could not recover in the form of action chosen, viz. case. (Record pp. 85, 87.)

The question as to whether if recovery could be had in case at all, the plaintiffs have sustained the allegations of their declaration so as to be entitled to recover on their declaration, arises on the evidence of the case (all the evidence being contained in the bill of exceptions) and is involved in the charge given by the Court, and is presented in the following one asked by the bank and refused by the Court:

"That the gravamen of the plaintiffs' declaration in this case is the fraudulent conduct of the defendant's cashier in reference to and in connection with the two drafts in evidence of date December 7th, 1876. Said cashier is charged with writing the body of said drafts with the design of deceiving the plaintiffs, and with putting memoranda thereon with the knowledge that the said memoranda were false and likely to mislead the plaintiffs, and were calculated to deceive the plaintiffs.

The said cashier is further charged with knowing when he discounted said two drafts of December 7th, 1876, that Melson had never procured any shipping bills for the hogs, cattle and stock referred to in said two last mentioned drafts, or any portion thereof, and that he, the said Melson, had no hogs, cattle, stock, or other property from the proceeds of which the plaintiffs might be reimbursed for paying said two drafts, either in whole or in part, and with further knowing that said Melson had not shipped and did not intend to ship any cattle, hogs, or stock, or any other property of value to said plaintiffs, from the proceeds of which, they, the said plaintiffs, might reimburse themselves for paying said drafts, and with knowing that if said plaintiffs should pay said drafts without security for reimbursement therefor, the plaintiffs would lose the whole sum advanced therefor.

These allegations are material allegations in this case, and the evidence before the jury does not sustain them, and the verdict of the jury should be for the defendant." (Record pp. 82, 83.)

So far as the charges contained in the declaration, are concerned, that Penfield, the Cashier, colluded and conspired with Melson to deceive the

plaintiffs by inducing the plaintiffs to pay the two drafts in suit, knowing that the memoranda upon the drafts, indicating a shipment of stock purchased from Tooley and Hunneyle, were false and calculated to deceive the plaintiffs; and knowing that Melson had never procured any shipping bills for the hogs cattle and stock referred to in the said drafts, and that said Melson had no hogs, cattle, stock or other property from the proceeds of which plaintiffs might reimburse themselves for paying said two drafts, either in whole or part, and that he (said Melson) had not shipped, and did not intend to ship any cattle, hogs, stock or other property of value to the plaintiffs, from which they might reimburse themselves for paying said drafts, and that if the plaintiffs paid said drafts without security, they would lose the monies so paid, and that plaintiffs would not pay the said two drafts if they knew at the time of payment that Penfield had not required shipping bills,—so far as these charges (which we deem material allegations) are concerned, the record contains no proof to support them. The case as made by the record on these last named charges does not sustain them. As far as concerns the memoranda on the draft, it was proven that some drafts had memoranda and some did not, and that the drafts having memoranda varied when compared with each other; and it was proven that Melson some times shipped stock on his own account to Hall, Patterson & Co., both before and after the letter of January 15th, 1876, was written, and that while he usually advised his firm of consignments made to them by him, he did not always do so. (Record pp. 49, 50.) It was further proven that the following drafts were samples of the various ones drawn by Melson during 1876, the different drafts being worded as indicated by the one or other of said samples:

$1503. *Quincy, Ill's*, October 30, 1876.

Pay to the order of U. S. Penfield, cas', fifteen hundred & three *dollars*, a/c Joseph Hunalt.

To Hall, Patterson & Co.,
Stock Yards, Chicago. W. G. MELSON.

$1267.00 *Quincy, Ill's*, April 8th, 1876.

Pay to the order of U. S. Penfield, cash,' twelve hundred & sixty-seven *dollars*, a/c 2 cars cattle.

To Hall, Patterson & Co.,
Stock Yards, Chicago, Ill. W. G. MELSON.

$1001.50. *Quincy, Ill's*, April 8th, 1876.

Pay to the order of U. S. Penfield, cash,' one thousand one & $\frac{50}{100}$ dollars, a/c S. C. Tooley, 3 cars stock.

To Hall, Patterson & Co.,
Stock Yards, Chicago. W. G. MELSON.

(Record pp. 54, 55.)

$700.80. *Quincy, Ill's*, June 1, 1876.

On demand, *Pay to the order of* First Nat'n' Bank, seven hundred & $\frac{80}{100}$ *dollars.*

To Hall, Patterson & Co.,
Union Stock Yards, Chicago, Ill. W. G. MELSON.

$160.60. *Quincy, Ill's*, Apr' 24, 1876.

Pay to the order of U. S. Penfield, cas,' one hundred & sixty & $\frac{60}{100}$ *dollars.*

To Hall, Patterson & Co.,
U. S. Y'd, Chicago, Ill.

W. G. MELSON.
(Record pp. 53, 54.)

As to the allegations concerning the hand writing and the memoranda together, it was proven that Melson was not a ready writer; that when he wanted to draw a draft he came to the bank and told the cashier or some teller the sum he wanted to draw for, and what he wanted written on the face of the draft, that the draft was then filled out by the cashier or teller, at Melson's request and dictation; that what has just been said was true of the drafts in controversy in this suit as well as all others ever drawn by Melson on Hall, Patterson & Co. during the entire period of his agency. (Record pp. 56, 57.)

As to the allegations about Penfield's knowledge that plaintiffs below would lose any money they paid on Melson's drafts without security, it was proven by the cashier, Penfield himself, that he had not learned as to Melson's responsibility at the time the drafts in question were drawn. (Record p. 59.)

As to the allegations that Penfield knew that Melson had not shipped and did not intend to ship stock to plaintiffs out of which they could reimburse themselves, it was proven by Penfield himself that he had no such knowledge, (Record pp. 58, 59), and that he had no knowledge as to whether there was or not stock to correspond with the memoranda on the drafts in controversy, (Record p. 59), and that the drafts in controversy were cashed upon the supposition that a uniform rule of the bank known to all stock agents, which required stock to be in transit before drafts were drawn by such agent, was being complied with. (Record p. 75.)

As to the allegations in substanee that Penfield knew that plaintiffs would not pay said two drafts, if they knew they had not been drawn against actual consignments, it was proven by Frank Patterson, one of the plaintiffs below, that the firm had paid certain drafts after the correspondence of January 15th and 17th, above set forth, with the knowledge that the same had not been drawn against stock, one of them being for as large a sum as $700.80. (Record pp. 50, 53.) While admiting the payments of these last drafts, plaintiffs say they supposed they were drawn for wages or partly for stock and partly for wages. Whatever their supposition may have been, the fact stands: that defendants in error did pay drafts after January 15th and 17th, 1876, which they knew were not drawn against consignments when they paid them.

On the admission and rejection of evidence, certain questions of law arise, the first one being as follows:

The allegations of the declaration in the case, charging Penfield, the cashier, as has just been shown, with colluding and conspiring with said Melson to deceive and defraud the plaintiffs, by inducing them to pay the two drafts of December 7th, 1876, and with designedly putting false memoranda on the said drafts, with the knowledge that they were false and would mislead the plaintiffs, (Record pp. 11, 12), the defendants below, the now plaintiffs in error, claiming that the inquiry was

material in view of said allegations, offered to prove by said Penfield "that he had never colluded with Melson in any way, and had never knowingly done any thing to deceive the plaintiffs in this suit in any thing connected with the two drafts in controversy." (Record p. 60.) The plaintiffs below objected to said evidence as being irrelevant and incompetent, the Court sustained the objection and excluded said evidence, and exception was taken by the bank. (Record p. 60.) The question of the admissibility of said evidence is one of the questions for the decision of this Court.

The next question arises on the offer of the defendant below to prove on the trial by Penfield, the cashier, who wrote the letter of the 17th of January, 1876, "that he, said Penfield, had no intention by writing the letter of January 17th, or by any thing therein contained, of contracting to do any thing to protect the interests of Hall, Patterson & Co. to whom said letter was addressed, and that by using the words, 'shall require shipping bills,' in that letter, he simply meant to indicate what he expected to have to do for the bank's protection and no body else's protection," which evidence was objected to, for irrelevancy and incompetency, by plaintiffs below, and the Court refused to allow said proof to be made, to which decision exception was taken by the bank's counsel. (Record pp. 66, 67.) The letters of the 15th and 17th of January, which, for the reason we have already heretofore set them out in *haec verba*, we do not repeat here, had been read in evidence, and the position of the bank was that the evidence was admissible, for the reason that it showed the good faith of Penfield in the transaction, and tended to disprove the allegations of fraud, and for the further reason, that the correspondence being commercial and much abbreviated, the Court could not say that said letters made a c ntract on the part of the bank, against its intention to bind itself.

The next question on the rejection of evidence arises out of the exclusion by the Court of the correspondence between Hall, Patterson & Co. and the Bank, previous to the 15th of January, 1876.

Against the objections of the defendant below (and now plaintiff in error), the letter of Hall, Patterson & Co., dated January 15th, 1876, notifying Penfield, the Cashier, that they would thereafter only pay drafts on actual consignments, and Penfield's reply dated January 17th, 1876, had been admitted in evidence. It had also been proven that Melson had been the agent of Hall, Patterson & Co. at Quincy, Illinois, for three years prior to the time of the writing of the letter of January 15th, 1876, and had as said agent, been getting his drafts on them cashed by the First National Bank of Quincy, Illinois, and that said Melson had been known at said Bank only as said agent, said Bank never having any business with him except as said agent. With a view of putting the Court in the situation of the parties, separate offers were made of the following letters, which were separately, and as offered, objected to for irrelevancy because written prior to January 15th, 1876, and excluded by the Court as separately offered for said reasons, and exception was taken to each decision of the Court in rejecting said respective letters. (Record pp 69, 70, 71.) Said letters are respectively in the words and figures following, to-wit:

"CHICAGO, 8—16, 1875.

U. S. PENFIELD,

Quincy, Ill.:

Our credit to Melson is only intended to cover drafts on stock in transit or about to be shipped from Quincy, as we don't think advisable to advance money to buy stock in the country.

Yours truly,

HALL, PATTERSON & CO."

Plaintiff in error then offered the following letter in evidence:

"CHICAGO, 11—5, 1875.

U. S. PENFIELD,

Cash. 1st National, Quincy, Ill.:

You can allow our agent, W. G. Melson, to draw on us at three days' sight, & we will honor his drafts.

He wants the money in hand to advance on stock down the R. R.

Yours truly,

HALL, PATTERSON & CO."

The position of the Bank was that the letter of January 15th, 1876, was a mere notification to the Bank of the extent of the authority of Hall, Patterson & Co.'s agent in drawing drafts, or else only an ordinary letter of credit; that they had no right to treat the last letter as one binding the Bank by way of contract, and that had the two letters offered in evidence and excluded by the Court, which are above set forth, been admitted in evidence, they would have shown that neither Hall, Patterson & Co., nor the Bank, had treated letters of like character with that of January 15th, 1876, which had passed between them, as matter of contract.

The next question for decision arises as follows:

The witness, Frank D. Patterson, had testified that a controversy had arisen between the Bank and Hall, Patterson & Co., growing out of a draft drawn by Melson on them, dated January 4th, 1876, which had been protested for non payment, and that said controversy had been by letter, but none of the letters relating to said controversy had been offered in evidence by the plaintiffs below, on the trial. (Record p. 32.) It also appeared from Penfield's testimony, that he had written two letters to Hall, Patterson & Co., to which the only reply received was the letter of the 15th of January, 1876, and that said two letters were those about to be mentioned. (Record p. 73.)

The plaintiff in error claiming, that the letters and each of them, about to be ~~offered in evidence~~ *received*, were admissible in connection with Patterson's testimony, to show what the nature of the controversy spoken of by him was, and that as antecedents of the letter of the 15th of January, 1876, and those to which it was a reply they were proper evidence as putting the Court in the position of the parties themselves and would shed light upon the circumstances under which that letter was written—made separate offers of the two following letters, offering first the following, after proof of its execution:

"JAN'Y 13TH, 1876.

Messrs. HALL, PATTERSON & Co.,
Chicago, Ills.:

I have in hand W. G. Melson's dr'ft on you, dated Jan'y 4th, $125, protested and returned for non-payment.

This dr'ft was given for balance due on shipment of stock, he having my check for several hundred dollars and paid for the stock in my presence. I would like to hear from you. I don't see how you can go back of the letter of credit I hold from you. I know nothing about this man Melson, nor have I seen him since return of the draft.

Very truly, yours, U. S. PENFIELD, *Cash.*"

Plaintiff in error then, after proof of its execution, offered the following letter in evidence:

"JAN'Y 14TH, 1876.

Messrs. HALL, PATTERSON & Co.,
Chicago:

I have this day cashed Melson's dr'ft endorsed by Joseph Hunalt on you for $2,631.05 on 3 cars hogs & one car cattle—will be shipped in the morning as per memorandum of supt. stock yards attached to the dr'ft.

This stock is shipped for my a/c; on payment of the d'f't—you will render a/c & forward balance to Joseph Hunault, Clarence, Mo. I am at a loss to know what to make of the return of Melson's protested df't for 125, your ag't, and we holding your letter of credit and no explanation. For this reason have shipped stock in my name.

Yours, U S. PENFIELD,
Cash."

The last two letters were offered separately and excluded by the Court, on the ground of irrelevancy, on objection of defendants in error, and exception taken to each ruling. (Record pp. 71, 72, 73.) The question of the correctness of each of the rulings of the Court below, in rejecting each of the above letters when offered in evidence, is before this Court for decision.

As a matter showing the prior relation of parties, and putting the Court in the position in which they stood to each other, prior to the 15th of January, 1876, the plaintiff in error offered to prove that the "bank had not at any time prior to January 15th, 1876, nor prior to said date, had U. S. Penfield, its cashier, exercised any agency for, or stood in the position of protecting the interest of Hall, Paterson & Co.," but on objection of the defendants in error, the Court rejected said evidence on the ground of irrelevancy. The plaintiff in error excepted to that decision, and its correctness is to be here questioned. (Record pp. 68, 69.)

To an understanding of the testimony of the witness Penfield, about to be quoted, and to an appreciation of the bearing of the question about to be raised, we deem mention of the following facts, proven on trial, necessary.

After the receipt of the letter of Hall, Patterson & Co., the bank refused to cash any more of Melson's drafts, and the business of this bank with Hall, Patterson & Co. had come to a stand still. Between January 14th, 1876 and January 31st, 1876, only one draft was cashed, one dated January 27th, 1876, and that was cashed on the strength of the

endorsement of one, S. C. Tooley. Whether Melson had or not informed his house before, does not appear in evidence, but in a letter to Hall, Patterson & Co., dated, Quincy, January 27th, 1876, said Melson informed Hall, Patterson & Co. that Penfield had refused to cash drafts because of the letter of January 15th, of Hall, Patterson & Co. to him and set forth above. The letter closes as follows:

"I don't encourage advancing money at all, but when my customers come and can't furnish them, some other agent will, and I lose him; so if you don't intend countermanding your letter to Penfield and giving me a show as you agreed to, please inform me and I will look for another job. * * * * Please let me hear from you by return mail.

Yours &c.,

W. G. MELSON."

(Record pp. 79, 80.)

Penfield, the cashier, testified that between the 27th and 31st of January, 1876, said Melson brought him a letter signed "Hall, Patterson & Co.," in the hand writing of Frank D. Patterson, a defendant in error, as well the body of the letter as the signature, and that upon the faith of that letter the bank commenced again to cash Melson's drafts on Hall, Patterson & Co., in the doing of which, the interruption above mentioned, had occured; that this letter Melson gave to him and he was about to file it away among other papers of the bank, but that said Melson earnestly solicited its return to him, promising that if allowed to take it, he, Melson, would return it to him, Penfield; that he gave it to Melson at his request; that the last he had seen of the letter was in Melson's hands; that Melson never returned it; that said letter was given by said Melson to him, Penfield, in connection with the business of Hall, Patterson & Co. with the bank and while Melson was the agent of said firm; that since he delivered said letter back to Melson, he had never seen said letter, and that the bank, since the commencement of the suit, had searched most extensively and had searched every where for said Melson, where its officers thought, or could learn he was likely to be, and had not been able to find said Melson or said letter. (Record pp. 65, 66). Frank D. Patterson, one of the plaintiffs below, had also testified, prior to Penfield's appearance on the witness stand, that he had searched diligently for Melson, and had made diligent inquiry for him, and had been unable to find him, or hear of any body that had seen or heard any thing of said Melson since his disappearance, on December 7th, 1876. (Record p. 40.) There was an allegation that said Melson had absconded. (Record p. 16.) Notice to produce said letter had also been served on the plaintiffs, and they had failed to produce it at the trial when asked for.

Having in this way laid a foundation for secondary evidence, the attorneys for the bank asked Penfield on the witness stand:

What were the contents of said letter? And offered to prove by the witness that said letter was dated January 28th, 1876, or thereabouts, and was addressed "to all whom it may concern," and certified that said Melson was the agent of Hall, Patterson & Co. for Quincy and North Missouri, and that as such agent, said Melson was authorized to draw sight drafts on said Hall, Patterson & Co generally, and that all drafts drawn by him on them during 1876, would be paid by them.

The plaintiffs below objected to the proof of the contents of the letter on the ground that the foundation had not been perfectly laid for secondary evidence of the contents of the letter. The Court ruled that proof had not been made of the destruction of the letter, and that the evidence

was not therefore admissible. (Record pp. 64, 65, 66.) This ruling was excepted to on the trial, and its correctness is one of the questions for this Court to de ermine. The position of plaintiffs in error is that had proof of the contents been allowed, the evidence would have been material in these views:

Firstly. It would have shown a change in the extent of Melson's authority as agent.

Secondly. In the light of contract, it would have shown a change in the terms thereof.

Thirdly. It would have illustrated the good faith of the bank and its cashier, charged with fraud, and it would h ve allowed the Court to determine a legal principle involved in this case, that where some body must be a loser by this man Melson's deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger.

The next question that arises concerns the question of the admissibility of evidence of the acts of Melson as agent of, and the extent of the authority exercised by him as agent in and about the business of Hall, Patterson & Co. at Quincy, Illinois, after January 15th and 17th, 1876, and during the rest of that year. Proof had been made that Melson was and had be n the agent, and only agent of Hall, Patterson & Co. at Quincy, Illinois, during 1874, 1875, 1876, and that said Quincy had been an important point for them during that time. (Record pp. 31, 32.) Proof had also been made that he transacted business as said agent during each year at the stock yards, under a letter of Hall, Patterson & Co., in substantially the following words and figures:

"*Chicago, Jan. 1st*, 1876.

To whom it may Concern:

This is to certify that W. G. Melson is our authorized agent, Quincy, Ills. and North Missouri, for the year A. D. 1876.

HALL, PATTERSON & Co."

(Record pp. 48, 49.) Proof had also been made that said letter was left on file, unchanged, at said stock yards after the change of firm on April 15th, 1876, and that the same was never withdrawn. (Record p. 49.) Proof was also made that by the rules of the stock yards at Quincy, Illinois, the evidence of the authority of an agent to act must be filed at the stock yards before an agent can do business there, and that the last foregoing letter was filed there pursuant to said rules of said stock yards. (Record p. 48.)

These being the proven facts, the plaintiff in error offered to prove by a witness, "That said Melson, during 1876 and down to December, 1876, at Quincy, exercised all the authority about the business of Hall, Patterson & Co., with the knowledge of the defendant, (the plaintiff in error), that said Hall, Patterson & Co., or any member of said firm, could have done if personally present in Quincy."

The foregoing evidence was objected to by the plaintiffs below for irrelevancy and incompetency, the objection was sustained by the Court, and the evidence excluded. Exception was taken by the bank's counsel at the time of its exclusion. (Record pp. 76, 77.)

Treating the question arising out of the letters of the 15th and 17th of January, as one of agency, the evidence last aforesaid was material as showing the extent of the authority of the agent. Treating the question

as contract, it tended to prove, that the contract had been changed or abandoned, and that Hall, Patterson & Co. no longer relied upon the limitation contained in the letter of the 15th of January, 1876, but had fallen back upon the unlimited authority mentioned in the letter filed at the stock yards, above set out in *haec verba*, dated January 1st, 1876. When it is remembered that the Court left the question of a change in the arrangement produced by the two letters of January 15th and 17th, 1876, to the jury, (Record pp. 88, 89,) the relevancy of this evidence in either view of the case, is apparent.

Upon the admission of evidence the following questions arise:

In a continuous narrative of some length, and no proof having been offered of authority in Penfield, the Cashier, to compromise, settle or adjust claims against the Bank, and said Penfield having testified that the adjustment of the claim was for the directors, (Record p. 62.)

Frank D. Patterson, one of the defendants in error, on the witness stand testifying to a conversation between him and Penfield, after the firm became aware of their loss, said that he asked Penfield what he was going to do about it. Penfield replied, he said he thought he had another letter of credit. Witness then asked him to find it, and said he would come in in the morning. Witness then said, he came back the next morning, and Penfield told him he had not found the letter. Witness then stated the following, which the Bank's counsel objected to, and moved to have excluded from the jury on the ground that no proof had been given that the Cashier of the defendant bank had power to settle or compromise, or determine as to claims against it, but the Court overruled said motion, and refused to exclude said evidence, and this decision of the Court the counsel for the Bank excepted to.

"Then," says I, "I suppose we will get our money." Says he, "I think you will; I think we shall pay it;" "and," says he, "you can go back to Chicago, and I think the money will be sent you." (Record pp. 45, 46.)

The next question upon the admission of evidence is the following:

S. Frank Hall, a defendant in error, on the witness stand, was asked: "Did you ever, in any way, authorize said Melson, after January 17th, 1876, and during said year, to draw drafts on Hall, Patterson & Co., except upon actual shipments in transit?"

This question was objected to by the counsel for the bank, for the reason that that was a question for the jury to determine from all the evidence in the case, and therefore not one for the witness to express his conclusions upon; but the Court overruled the objection and allowed the witness to answer the question, and exception was taken to the ruling. The witness answered, "I never did."

Each of the defendants in error was put upon the stand, asked the same question, under like exception and objection, and answered the question the same way. (Record pp. 81 & 82.) The correctness of the decision in each of the above cases is questioned and for decision in this Court.

Upon the admission of evidence, one more question arises:

Frank D. Patterson had stated upon the witness stand, that Hall, Patterson & Co., telegraphed U. S. Penfield, about the stock connected with the two drafts of December 7th, 1876, paid by them, and out of which this suit arises, but he could not say whether it was done before or after the said drafts had been paid by them.

The witness was then asked the following questions, which he answered as after each question stated:

Ques. 1. Have you any copies of the telegrams or the telegrams themselves?

Ans. No, sir; they were destroyed. These telegrams when they get old become such a bundle they are thrown into the waste basket.

Ques. 2. Have you searched for these papers?

Ans. Yes, sir.

Ques. 3. Have you inquired at the telegraph office?

Ans. Yes, sir; can't get copies of telegrams that are over six months old. That's their practice.

4 (Question by the Court). Is that their practice?

Ans. Yes, sir; couldn't get it. Mr. Goff, manager at Chicago, told me they kept all telegrams till they were six months old and then destroyed them.

The foregoing interrogatories and answers contain all the evidence introduced as a foundation for the answer to the next interrogatory. No officer, agent or employee of the telegraph company was put upon the stand to testify, nor was the said Mr. Goff offered as a witness, although his declarations were objected to by the Bank's counsel on the trial as inadmissible.

Witness was then asked:

Now I will ask you to state what you telegraphed him, and what his reply was.

The defendant below (the now plaintiff in error) objected to the witness answering said question, for the following reasons:

Firstly. That the defendant had no notice to produce the original or any copies of the two despatches, it was proposed to prove.

Secondly. Because the proper foundation had not been laid for the introduction of secondary evidence of the contents of the two despatches inquired about.

Upon the first ground of objection, a question arose between the counsel for the plaintiffs and the defendant below, as to what the notice given by the former to the latter included, and the notice itself was produced and read. Said notice was notice to produce all original letters addressed to said defendant or U. S. Penfield, its Cashier, by the plaintiff in this suit, in relation to the business and dealings of the plaintiffs with one W. G. Melson, and especially a letter addressed to said defendant or said Penfield, on the 15th day of January, A. D. 1876, and also all correspondence between said defendant or said Penfield and one Libby, the superintendent or manager of the Stock Yards in Quincy, Illinois, in relation to the business of said Hall, Patterson & Co., or said Melson at said Stock Yards, or in the shipping of live stock, also all copies you may have of letters to said Libby or other parties engaged at said Stock Yards, relating to the business of said Melson, or said plaintiffs in this suit.

The Court overruled the objection of said defendant bank, and allowed the question to be answered, and to this ruling exception was taken.

The witness answered:

We telegraphed Mr. Penfield to know where Mr. Hunnegle's and Mr. Tooley's stock was, and his reply was, it had gone by the way of Hannibal, Missouri. (Record pp. 42, 43, 44.)

ASSIGNMENT OF ERRORS.

I. The Court erred in instructing the jury, against the objection of the defendant below, in manner following, that is to say:

"The letter of the plaintiffs of the 15th of January, and the answer to it by the cashier of the bank on the 17th of January, have been read to the jury. I state to the jury that those two letters constitute a binding contract between the plaintiffs and the defendant, by which the defend ant agreed not to cash any drafts drawn by Melson on the plaintiffs unless they were based on actual consignments of produce." (Record p. 90.)

II. The Court erred in instructing the jury against the objection of the defendant below, in manner following, that is to say:

"Now, under that arrangement created by the said letters of the 15th and 17th of January, in evidence before you, it was the duty of the defendant. before it cashed a draft, to ascertain that it was based upon an actual consignment of produce to the plaintiffs, and if it cashed any drafts that were not based upon consignment of property to the plaintiffs, and the plaintiffs sustained any loss by reason of such failure, the bank will be responsible to the plaintiffs," (Record p. 91.)

III. The Court erred in instructing the jury, against the objection of the defendant. in manner following, that is to say:

"If the jury should come to the conclusion tnat the contract created by the letters of the 15th and 17th of January was not changed, but continued in force until these two drafts in question were drawn and if those drafts were not actually drawn upon consignment of property to the plaintiffs, then if the plaintiffs paid the drafts, the plaintiffs would be entitled to recover anydamage which might be sustained by such payment, there being no consignment to meet the draft; if, as it appears in this case, the drawer of the drafts, Melson, was worthless, then I suppose it would follow that the plaintiffs would be entitled to recover the amount from the defendant." (Record p. 92.)

IV. The Court erred in instructing the jury, against the objection of the defendant below, in manner following, that is to say:

My opinion is that under this arrangement of the 15th of January, it was the duty of the cashier before he cashed a draft, to ascertain that it was based on an actual shipment, and the plaintiffs had a right to conclude that all drafts drawn while that contract was in force was based on actual shipments. (Record p. 93.)

V. The Court erred in instructing the jury, against the objection of the defendant below, in manner following, that is to say:

"The testimony of the witness Boyer, as to the course of business down at the Stock Yards at Quincy, does not tend to prove that there was any revocation of the letter of January 15th, 1876." (Record p. 94.)

VI. The Court erred in admitting the plaintiffs below, against the objection of the defendant, to introduce in evidence on the the trial of said cause, the letter of Hall, Patterson & Co., the same with its letter head being in the words and figures following, to-wit:

"All drafts upon us must have bill of lading attached and not exceed two-thirds value of consignment.

S. F. Hall, Frank D. Patterson, A. L. Patterson. Hall, Patterson & Co., Live Stock Commission Merchants, Union Stock Yards,

CHICAGO, *Jan'y 15th*, 1876.

U. S. PENFIELD, *Cashier*,
Quincy, Ill's.:

DEAR SIR: Hereafter we will only pay drafts on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day, or the day after presented to us.

This letter will cancel all previous arrangement of letters of credit in reference to W. G. Melson.

Please acknowledge receipt of this and oblige.

Yours, respectfully,

HALL, PATTERSON & CO."

(Record pp. 33, 34.)

VII The Court erred in admitting the plaintiffs below, against the objection of the defendant, to introduce in evidence on the trial of said cause, the letter of Penfield, cashier, in the words and figures following, to-wit:

"QUINCY, ILL., *Jan'y* 17, 1876.

Messrs. HALL, PATTERSON & Co.,
Chicago:

DEAR SIRS: Your favor 15th received. I note what you say. We have never knowingly advanced Melson any money on stock to come in. Have always supposed it was here in transit. Have always taken his word. After this we shall require ship'g bill.

Very truly yours,

U. S. PENFIED,
Cashier."

(Record pp. 35, 36.)

VIII. The Court erred in refusing to instruct the jury, upon the request and motion of the defendant, in manner following, that is to say: "It is proven to the jury that during the months of January, A. D. 1876, and at the time the respective letters in evidence, dated January 15th, 1876, and January 17th, 1876, were respectfully written and received, the firm of Hall, Patterson & Co. was composed of S. Frank Hall, Augustus L. Patterson, and Frank D. Patterson, and that on April 1st, 1876, said firm was changed so as to consist of the plaintiffs in this suit. The jury are instructed that for any breach of any agreement resulting from said two last named letters the plaintiffs in this case, owing to said change of firm, cannot recover, and the verdict of the jury should be for the defendants." (Record pp. 85, 86.)

IX. The Court erred in refusing to instruct the jury, upon the request and motion of the defendant, in manner following, that is to say: "The plaintiff's declaration alleges the letter of January 15th, 1876, in evidence, to have been written by the plaintiffs in this suit, and the letter of January 17, 1876, signed U. S. Penfield, cashier, and in evidence, to have been addressed to the plaintiffs in this suit. These allegations are not sustained by the evidence in this case, and for the variance between said allegations and said evidence the plaintiffs cannot recover in this case, and the verdict of the jury should be for the defendant in this case." **(Record p. 84.)**

X. The Court erred in refusing to instruct the jury, upon the reqnest and motion of the defendant, in manner following, that is to say: "That the gravamen of the plaintiffs' declaration in this case is the fraudulent conduct of the defendant's cashier in reference to and in connection with the two drafts in evidence of date December 7th, 1876. Said cashier is charged with writing the body of said drafts with the design of deceiving the plaintiffs, and with putting memoranda thereon with the knowledge that the said memoranda were false and likely to mislead the plaintiffs, and were calculated to deceive the plaintiffs.

The said cashier is further charged with knowing when he discounted said two drafts of December 7th, 1876, that Melson had never procured any shipping bills for the hogs, cattle and stock referred to in said two last mentioned drafts, or any portion thereof, and that he, the said Melson, had no hogs, cattle, stock, or other property from the proceeds of which the plaintiffs might be reimbursed for paying said two drafts, either in whole or in part, and with further knowing that said Melson had not shipped and did not intend to ship any cattle, hogs, or stock, or any other property of value to said plaintiffs, from the proceeds of which, they, the said plaintiffs, might reimburse themselves for paying said drafts, and with knowing that if said plaintiffs should pay said drafts without security for reimbursement therefor, the plaintiffs would lose the whole sum advanced therefor.

These allegations are material allegations in this case, and the evidence before the jury does not sustain them, and the verdict of the jury should be for the defendant." (Record pp. 82, 83.)

XI. The Court erred in refusing to instruct the jury, upon the request and motion of the defendant, in manner following, that is to say: "The form of action chosen by the plaintiffs in this case is an action upon the case. The plaintiffs cannot recover in said form of action, upon the evidence before the jury in this case, and the verdict of the jury should be for the defendant." (Record p. 85.)

XII. The Court erred in refusing to instruct the jury, upon the request and motion of the defendant, in manner following, that is to say: "Upon the evidence before the jury in this case, the plaintiffs cannot recover, and the jury should find for the defendant." (Record p. 87.)

XIII. The Court erred in refusing to allow the plaintiff in error to prove by the witness Penfield, "that he had never colluded with Melson in any way, and had never knowingly done anything to deceive the plaintiffs in this suit in anything connected with the two drafts in controversy, or any others drawn by Melson and cashed by the Bank." (Record p. 60).

XIV. The Court erred in refusing to allow the plaintiff in error to prove by the witness Penfield, "that he had no intention by writing the letter of January 17th, 1876, or by anything therein contained, of contracting to do anything to protect the interest of Hall, Patterson & Co., to whom said letter was addressed, in any way, and that by using the words 'shall require shipping bills,' in that letter, he simply meant to indicate what he expected to have to do for the bank's protection, and nobody's else protection. (Record pp. 66, 67.)

XV. The Court erred in refusing to allow the plaintiff in error to prove by the witness Penfield, that owing to the unwillingness of the bank to be at the trouble of ascertaining for its protection, whether drafts were

drawn upon consignments, the defendant bank, after the receipt of the letter of Hall, Patterson & Co., dated January 15, 1876, refused to cash any more drafts of said Hall, Patterson & Co., and all employees of said bank were directed to cash no more of said Melson's drafts on Hall, Patterson & Co., and the business of said bank with said Melson and said Hall, Patterson & Co. was wholly discontinued by said defendant bank. (Record p. 63.)

XVI. The Court erred in refusing to allow the plaintiff in error on the trial below to introduce in evidence a letter of Hall, Patterson & Co., in the words and figures following, to-wit:

"CHICAGO, 8, 16, 1875.

U. S. PENFIELD,
Quincy, Ill.:

Our credit to Melson is only intended to cover drafts on stock in transit or about to be shipped from Quincy, as we don't think advisable to advance money to buy stock on in the country.

Yours truly,

HALL, PATTERSON & CO."
(Record p. 69.)

XVII. The Court erred in refusing to allow the plaintiff in error to introduce in evidence on the trial below, a letter of Hall, Patterson & Co., in the words and figures following, to-wit:

"CHICAGO, 11, 5, 1875.

U. S. PENFIELD,
Cash. 1st National Bank, Quincy, Ill.:

You can allow our agent, W. G. Melson, to draw on us at three days' sight, and we will honor his drafts.

He wants the money to advance on stock down the R. R.

Yours truly,

HALL, PATTERSON & CO."
(Record pp. 70, 71.)

XVIII. The Court erred in refusing to allow the plaintiff in error to introduce in evidence a letter of Hall, Patterson & Co., in the words and figures following, to-wit:

"JAN'Y 13TH, 1876.

Messrs. HALL, PATTERSON & Co.,
Chicago, Ills.:

I have in hand W. G. Melson's dr'ft on you, dated Jan'y 4th, $125, protested and returned for non-payment.

This dr'ft was given for balance due on shipment of stock, he having my check for several hundred dollars and paid for the stock in my presence. I would like to hear from you. I don't see how you can go back of the letter of credit I hold from you. I know nothing about this man Melson, nor have I seen him since return of the draft.

Very truly, yours, U. S. PENFIELD, *Cash.*"
(Record pp. 71, 72.)

XIX. The Court erred in refusing to allow the plaintiff in error, to introduce in evidence a letter in the words and figures following, to-wit:

"JAN'Y 14TH, 1876.

Messrs. HALL, PATTERSON & Co.,
Chicago:

I have this day cashed Melson's dr'ft endorsed by Joseph Hunalt on you for $2,631.05 on 3 cars hogs & one car cattle—will be shipped in the

morning as per memorandum of supt. stock yards attached to the dr'ft.

This stock is shipped for my a/c; on payment of the d'f't—you will render a/c & forward balance proceeds to Joseph Hunault, Clarence, Mo. I am at a loss to know what to make of the return of Melson's protested df't for 125, your ag't, and we holding your letter of credit and no explanation. For this reason have shipped stock in my name.

Yours, U. S. PENFIELD,
Cash."

(Record pp. 72, 73.)

XX. The Court erred in refusing to allow the plaintiff in error to prove on the trial below, as follows:

That the said bank had not at any time prior to January 15th, 1876, nor prior to said date, had its cashier exercised any agency for, or stood in the position of protecting the interests of Hall, Patterson & Co. (Record p. 69.)

XXI. The Court erred in refusing to allow the plaintiff in error to prove by the witness Penfield, the contents of the letter delivered to said Penfield by said Melson and dated about January 28th, 1876, and at the said Melson's request, returned by said Penfield to said Melson, the offer of plaintiff in error being to prove as follows:

That said letter was dated about January 28th, 1876, and was addressed, "To all Whom it may Concern," and certified that said Melson was the agent of Hall, Patterson & Co. for Quincy and North Missouri, and that as such agent, said Melson was authorized to draw sight drafts on Hall, Patterson & Co. generally, and that all drafts drawn by him on them during 1876, would be paid by them. (Record p. 66.)

XXII. The Court erred in refusing to allow the plaintiff in error on the trial below, to prove as follows:

"That said Melson during 1876, and down to December 1876, at Quincy, exercised all the authority about the business of Hall, Patterson & Co with the knowledge of the defendant (plaintiff in error), that said Hall, Patterson & Co., or any member of said firm, could have done themselves, if personally present in Quincy. (Record pp. 76, 77.)

XXIII. The Court erred in refusing to exclude from the jury, on motion of plaintiff in error, the following testimony of the witness Frank D. Patterson, as to a conversation after the loss in question, between him and Penfield, the cashier:

"Then," says I, "I suppose we will get our money." Says he, "I think you will; I think we shall pay it;" and says he, "You can go back to Chicago, and I think the money will be sent you." (Record p. 45.)

XXIV. The Court erred in allowing the witness S. Frank Hall, to answer, against the objection of plaintiff in error, the question:

Did you in any way authorize said Melson, after January 17th, 1876, and during said year, to draw drafts on Hall, Patterson & Co., except upon actual shipments in transit?

The witness answer being, "I never did." (Record p. 81.)

XXV. The Court erred in allowing each and every of the four defendants in error, other than said S. Frank Hall, to testify against the objection of plaintiff in error, that he had never in any way, after January 17th, 1876, and during said year, authorized Melson to draw drafts on Hall, Patterson & Co., except upon actual shipments in transit. (Record pp. 81, 82.)

XXVI. The Court erred in allowing, against the objection of the plaintiff in error, the witness Frank D. Patterson, to testify as to the contents of the despatches that passed between him and the Cashier, Penfield.

The question propounded to said witness being, as follows:

"Now, I will ask you to state what you telegraphed him, and what his reply was?"

The answer of the witness, was:

"We telegraphed Mr. Penfield to know where Mr. Hunnegle's and Mr. Pooley's stock was, and his reply was, it had gone by the way of Hannibal, Missouri, which is south of Quincy some ways, and one of the ways that stock from Missouri might go to Chicago." (Record p. 44.)

XXVII. The Court erred in rendering judgment on the verdict of the jury in this case.

And the said, The First National Bank of Quincy, Illinois, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by occasion of the said judgment.

WILLIAM McFADON,
Attorney for Plaintiff in Error.

BRIEF OF ARGUMENT.

I.

A. The letter of Hall, Patterson & Co., dated January 15th, 1876, to the cashier, Penfield, was either one of two things:

Firstly. A mere notice to such cashier of a limitation which Hall, Patterson & Co. had seen fit to engraft upon the authority of their own agent, as to drawing drafts upon them, in which case the only questions to grow out of said letter, are such as relate to the law of agency.

Schimmelpennich vs. Bayard, 1 Peters, 285, 286, 290.

Murdock et al vs. Mill, 11 Metc., (Mass.) 13.

Story on Agency, § § 72, 81.

or: Secondly. An ordinary letter of credit, one with which, and the rights and liabilities incident thereto, the commercial world is familiar, a letter conferring a conditional authority to draw, and containing a conditional promise to pay drafts.

Bissell vs. Lewis, 4 Mich., 454.

Lonsdale & Gray vs. The Lafayette Bank, 18 O., 126.

Merchants' Bank vs. Griswold, 72 N. Y., 477.

Murdock et al vs. Mills, 11, Metc. (Mass.) 13.

the rights and liabilities of parties being in this class of cases, as is well understood, that the party sueing upon the promise to accept must show that the party drawing the bill pursued and conformed to the authority given, else there can be no recovery on the promise.

Bissell vs. Lewis, 4 Mich., 455.

Murdock et als vs. Mills, 11 Metc., 10.

But we nowhere find any case deciding their liability to be as assumed by the Court below, in this case, viz: that the party to whom a letter of credit is written, by an acknowledgment of the receipt thereof, binds himself as a matter of contract, to see to the fulfillment of the condition precedent, for the protection, not of himself, but that of the writer of the letter of credit.

B. Contract cannot be predicated of Hall, Patterson & Co.'s said letter of January 15th, 1876, to Penfield, the cashier:

Firstly. Because Hall, Patterson & Co., by said letter, merely tell Penfield they do not intend to cash drafts except on actual consignments. They do not, in said letter, make any proposition or request to said Penfield, to do, or abstain from doing any particular thing, one or the other of which must exist as a condition precedent to a contract.

Bouvier's Law Dic. "Assent."

1 Parsons on Contracts, 475.

Secondly. Because no proposition or request to the bank being contained in said letter, when Penfield sent his reply dated January 17th, 1876, acknowledging the receipt of the letter of January 15th, 1876, in accordance with the request therein contained, he could not, by the mere act of acknowledgment, have assented to any proposition or request, to do or not to do any particular thing.

Thirdly. Nor did he make any legal contract by saying at the close of said reply, "after this we shall require ship'g bill," for to a contract there must not only be an assent, but an assent to the same thing, in the same sense, by both parties;

1 Parsons on Cont., 475;

and the bank not being asked in said letter of January 15th, 1876, to do or abstain from doing any particular thing, there was nothing in that letter to which the words, "After this we shall require ship'g bill," was responsive. Not being responsive to anything in said last named letter, those words did not evidence an assent or concurrence of two minds to the same proposition at all, much less any "assent to the same thing in the same sense," without which there can be no contract.

Fourthly. Because if the letter of Hall, Patterson & Co., of January 15th, 1876, to the cashier, Penfield, could be regarded as a proposition to Penfield, the cashier, that he should cash no drafts unless drawn on actual consignments, his reply of the 17th of January, departed from the proposition as tendered by that letter, and varied the terms of the offer by only agreeing to take shipping bills or bills of lading, which is a very different thing from agreeing to see that there were actual consignments.

1 Chitty on Contracts, (11th Am. Ed.), 15.

1 Pars. on Contracts, 477.

Leather vs. Simpson, Law Reports, 11 Equity cases, 403.

Fifthly. Because if contract had been in the mind of parties to the letters of the 15th and 17th of January, 1876, they would have provided for its duration in terms. Provision would also have been made as to the kind, quantity and value of stock represented by the shipping bill. As the letters read, if there was any contract, the terms would be answered by a shipping bill representing one steer, or one dozen hogs, as well as any larger number; and the absence of these provisions militates against the theory of contract.

C. But while the words, "After this we shall require ship'g bill," cannot be treated as evidencing an assent on the part of the bank to anything proposed or contained in the letter of Hall, Patterson & Co., of January 15th, 1876, to Penfield, cashier, said words even if treated as an independent offer emanating from the bank, would not make a contract.

Firstly. Because, it being an undisputed fact in the case, that no reply was ever made by Hall, Patterson & Co., orally or by letter, to Penfield's letter containing said words, viz: the letter of January 17th, 1876, to Hall, Patterson & Co., (Record pp. 51, 57,) and Hall, Patterson & Co. having never notified the bank or its cashier that they relied upon the bank's taking shipping bills, (Record p. 57, there was no acceptance thereof; nor was there, in any view of the case, any consideration to support such a promise.

Secondly. And in no event was either party bound to do anything, and hence the statement about shipping bills was without consideration —a mere *nudum pactum.*

Chicago and Great Eastern R. R. Co. vs. Dane, 43 N. Y., 240.

II.

But if the Court could adjudge as a matter of law and so instruct the jury, that the said letter of Hall, Patterson & Co., dated January 15th, 1876, and the reply of Penfield, the cashier, made a contract at all, the Court erred in adjudging:

Firstly. That the contract was to cash no drafts except upon *actual consignments.* The promise, if any was made, was to take shipping bills or bills of lading, and such it is alleged to be throughout the declaration; and the error of construing a promise to take a bill of lading to be a promise not to cash drafts, unless drawn against actual consignments, is shown in

Leather vs. Simpson, Law Reports, 11 Equity cases, 403.

Secondly. The Court assumed in the instructions to the jury, that the bank, as a result of said two letters, had not only contracted that there should be a consignment of stock in the case of every draft cashed by it, but that such consignments should be of stock of value sufficient to pay it. There was no request in the letter of January 15th, 1876, to Penfield, cashier, to this effect. There was nothing of the kind said in his reply Such being the case, the Court erred in determining that, as a matter of law, on the letters themselves, there was an assent of the bank to such a thing.

III.

The reasonableness of treating the letter of the 15th of January, 1876, to Penfield, the cashier, as a notice of the authority of an agent, is enforced by this further view of the matter:

That treated as a notice of the authority of an agent, the receipt of the letter by Penfield was notice to the bank.

Viewed as a contract, there being no proof as to what Penfield's authority as cashier was, the presumption would be that he had as cashier, only the powers and duties which the law has determined to be inherent in that office.

Morse on Banking, 2nd Ed., 153.

First Nat. Bank vs. Ocean Bank, 60 N. Y., 287, 291.

United States vs. City Bank of Columbus, 21 How., (U. S.), 364.

Fleckner vs. Bank of United States, 8 Wheat., 357.

And a contract like this, on the theory of contract, would be one involving the payment of money, and one which the cashier could not make in the exercise of his ordinary duties,

United States vs. City Bank, 21 How., (U. S.), 364,

and the Court could not say as a matter of law on the evidence in the case, that the bank was bound by the cashier's correspondence.

IV.

But the Court should not have decided as a matter of law, that the correspondence of the 15th and 17th of January made a contract, and what the contract was. Being commercial correspondence, the Court should have referred the question to the jury to say in what sense the words, "we shall require ship'g bill," were used; whether for the bank's protection or for that of Hall, Patterson & Co.

Brown & Co. vs. McGraw, 14 Peters, 493, 494.

Lucas vs. Groning, 7 Taun., 164.

V.

a. The record in the case shows that the plaintiffs in this suit were not in existence as a firm when the letters of the 15th and 17th of January, 1876, were written. (Record p 30.) Hence if any contract was created by them, it was a contract with other persons than those bringing this suit. The testimony of Penfield, the cashier, is uncontradicted, that no notice of the change which occurred in the firm on April 1st, 1876, was ever brought to the bank, and that prior to the time, when Hall, Patterson & Co. paid the two drafts on which this suit is based, said bank never had any knowledge or information that any change had taken place in said firm of Hall, Patterson & Co. (Record p. 58.) No proof was made of publication of any notice of the dissolution of the old firm or formation of the new was made.

In view of the evidence in the case, the Court erred in saying, *as a matter of law*, to the jury, that said two letters made a contract between the plaintiffs in this suit, (the defendants in error), and the bank.

Dicey on Parties, * page 152.

Parsons on Partnership, (3d Ed.), * pages 330, 331, 332, 333.

Horbach vs. Huey, 4 Watts., 455.

b. And if the action be regarded, as the Court below regarded it, as an action on the case to recover for negligence, the negligence consisting in a mere breach of contract, the rule is fully established that, for a tort of such kind growing out of contract, only the parties to the contract can maintain an action for such negligence,

1 Addison on Torts, (Wood's Ed.), § § 27, 32,

2 " " " " " § 1288,

Sher. & Redf. on Negligence, § 54,

Kahl vs. Love, 37 N. J. Law, pp. 8, 9, 10,

a possible exception existing where the act of negligence is positively dangerous to the lives of others, in which case the person injured may sue.

Burke vs. DeCastro & Co., 18 N. Y. Sup. Court, 354.

Sher. & Redf. on Negligence, § 54.

VI.

But even if the Court below was right in treating the declaration as one on which the plaintiffs could recover for mere negligence; yet even if the letters of the 15th and 17th of January, aforesaid, created a contract, as the Court below instructed, no recovery could be had for a breach thereof in an action of tort.

Cooley on Torts, pp. 4, 23, defining "Tort."

1 Chit. Plead., * p. 135.

Corbett vs. Packington, 6 B. and C., 268.

Masters vs. Stratton, 7 Hill N. Y., 102, and cases cited.

VII.

But the Court erred in viewing the declaration as one on which a recovery could be had for negligence.

Firstly. Because the allegations make out a clear case of fraud in fact. (Record pp. 10, 11, 12, 13, 14.) The defendant below was, by said declaration, apprised of that charge and nothing else, and on such a declaration, the plaintiffs could only recover on proof of these allegations,

Leighton vs. Grant, 20 Minn., 354,

Tellinghast vs. Champlin, 4 R. I., 202,

the rule being so strict that on a declaration charging actual fraud, recovery cannot be had on proof showing only constructive fraud,

Big. on Frauds, p. 466,

or only a mistake or neglect of duty.

Mercier vs. Lewis, 39 Cal., 532.

Dudley vs. Scranton, 57 N. Y., 424.

Big. on Frauds, p. 466.

Secondly. Because the declaration with the allegations as to fraud in fact, was not demurrable. Disregarding them, the declaration would be demurrable on several grounds, among others this, that it showed a case of mere non-feasance without any statement of consideration, the statement of the consideration being necessary in such cases,

1 Chit. on Plead. * p. 383,

and with those allegation disregarded, questions as to whether the two letters set out therein, dated January 15th and 17th, 1876, amounted to a contract, could have been raised on demurrer.

Thirdly. Treated as a declaration showing mere negligence, the question of the right to recover in tort, (were recovery in any view of the case possible), could have been raised on the pleadings. With the allegations of fraud in fact in it, such question could not be so raised, as the declaration discloses a good cause of action.

For the foregoing reasons, the allegations as to fraud in fact, could not have been disregarded. They constituted material allegations of the declaration, which the plaintiffs below should have been required to prove as a condition precedent to recovery.

1 Chit. on Plead., * p. 229.

1 Green on Ev, § 63.

VIII.

The letters of the 15th and 17th of January, 1876, were not admissible in evidence:

Firstly. Because they constitute a correspondence between other persons than the parties to this suit. (Record pp. 30, 31.)

Boyce vs. Edwards, 4 Pet., 120.

Secondly. The declaration alleges that the letter of January 15th was written by the plaintiffs, (Record p. 7), and that the reply of the Cashier of January 17th, was addressed to the plaintiffs, and counts on a promise to the plaintiffs resulting from those letters. (Record pp. 8, 9) The proof shows that the plaintiffs did not exist as a firm till after said letters were written, to-wit: on April 1st, 1876. (Record pp. 30, 31.) Hence, a variance which is as fatal in an action of tort as contract.

1 Chit. on Plead, * pp. 384, 386,

and the Court, having admitted said letters in evidence against the objection of the defendant below. (Record pp. 34, 35, 36, 37), should have instructed, at the instance of the Bank, that the variance was fatal to the recovery of the plaintiffs. (Record pp. 84, 85, 86.)

IX.

The defendant below, now plaintiff in error, was entitled to prove the contents of the letter exhibited by Melson to Penfield, the Cashier, and returned by the latter to the former.

Firstly. Because proof had been made that the letter was delivered to Melson, and that at the time of such delivery, he was the agent of Hall, Patterson & Co. (Record pp. 64, 65.) Notice to produce said letter had been given to the plaintiffs. (Record pp. 65, 66.) On their failure to produce it, after such notice, secondary evidence of its contents was admissible, because of the fact that said letter was last seen in the hands of their agent.

Robb. vs. Starkey, 2 Carrington & Keiran, 143.

Sinclair vs. Stevenson, 1 Car. & Payne, 582.

1 Green on Ev. § 560 and Note 5.

Secondly. Because, if Melson be treated as an independent third party, then secondary evidence of its contents was admissible, because by the proof of the search made by the Bank officers for Melson and the letter—its non-production was satisfactorily accounted for, and especially was this the case in view of the fact that the declaration in the case alleged that Melson had absconded, and that the witness Frank

D. Patterson had testified how extensively he had searched for Melson, and had been unable to find him or hear of any one who had seen or heard of Melson. (Record pp. 39, 40).

United States vs. Reyburn, 6 Pet. 352, 364.

Moody vs. Commonwealth, 4 Met. Ky. 4.

1 Wharton on Ev., § 129.

X.

Evidence as to the acts of Melson, as agent of Hall, Patterson & Co., at Quincy, Illinois, after the 17th of January, 1876, and during that year, in the transaction of their business, and as to the authority exercised by him in the conduct of his agency at that point, was admissible and proper, and should not have been excluded on the trial below.

Story on Agency, § 81.

Schimmelpennich vs. Bayard, 1 Pet., 264.

And witness Boyer having testified as to Melson's acts at the Quincy Stock Yards, (Record pp. 75, 76,) an instruction by the Court that the testimony of the witness Boyer as to the course of business at the Quincy Stock Yards did not tend to prove that there was any revocation of the letter of January 15th, 1876, was erroneous. (Record p. 94.)

XI.

In the absence of proof of such authority, it was no part of the business of Penfield as Cashier, to adjust, settle or compromise claims against the bank. Hence the Court should have excluded, on the motion of the plaintiff in error, that part of the testimony of the witness Patterson, relating to payment of the claim, such testimony being as follows:

"Then," says I, "I suppose we will get our money?" Says he, "I think you will; I think we shall pay it," and says he, "you can go back to Chicago, and I think the money will be sent you." (Record p. 45.)

XII.

The Court should not have allowed the five plaintiffs in the case, respectively, to testify that he had never, in any way, authorized said Melson, after January 17th, 1876, to draw drafts on Hall, Patterson & Co., except upon actual shipments in transit. (Record pp. 81, 82.) That fact was a question for the jury to determine.

Hoener vs. Koch, 84 Ill., 409.

C. & A. R. R. Co. vs. S. & N. W. R. R. Co., 67 Ill., 146.

Atlantic & Great West. R. R. vs. Campbell, 4 O. S. 585.

XIII.

No sufficient foundation was laid for the introduction of secondary evidence of the contents of the telegrams, which passed between Hall, Patterson & Co., and the Cashier, Penfield, concerning the whereabouts of stock, and the witness, Patterson, should not have been allowed to testify as to the same. (Record pp. 42, 43, 44).

Firstly. Because no notice to produce the orginal or any copies was given to the bank, or to Penfield its cashier, or to its attorneys.

Cairo & St. L. R. R. Co. vs. Mahoney, 82 Ill., 74.

Secondly. Because the declarations of Mr. Goff, the telegraph manager at Chicago, did not constitute proper and legal proof of loss. He should have been produced as a witness.

Chapin vs. Taft, 18 Pick., 379.
Poignard vs. Smith, 8 Pick., 277.
King vs. Denia, 7 Bar and Cres., 620.
Mariner vs. Saunders, 5 Gilman, 120.
Becker et al vs. Quigg, 54 Ill., 395.
1 Whart. on Ev., § 175.
1 Green, on Ev., § 558.

XII.

But as settling the case upon its intrinsic merits in favor of the plaintiff in error, we cite the following as settled legal principles:

Firstly. That the bank having done all that it did do entirely innocently, and the party practing the deception being the agent of the defendants in error, they should bear the loss rather than the bank.

Hern vs. Nichols, 1 Salk., 289.
Stoner vs. Millikin, 85 Ill., 221.
Storer vs. Logan et al, 9 Mass., 59, 60.

Secondly. On the supposition that Hall, Patterson & Co. were as innocent as the bank, and they were also deceived, the bank in possession of the money should be allowed to retain it, for the equities of parties are equal.

Leather vs. Simpson, Law Rep., 11 Eq. Cases, 407.
First Nat. Bank of Detroit vs. Burkam, 32 Mich., 330.

Thirdly. Because the drafts having been paid by the drawee on presentation and (as the law presumes) in obedience to a legal obligation, without proof of fraud on the part of the payee, there can be no recovery,

Hoffman & Co. vs. Bank of Milwaukee, 12 Wal., 181,

and the knowledge of the payee that the drawer had authority to draw only against actual consignment, does not constitute fraud.

Craig vs. Sibbett et al, 15 Penna. St., 240.

ARGUMENT.

When the declaration in this case first came under our observation, we supposed the same to have been drawn, in recognition of the law as laid down by this Court in,

Hoffman & Co., vs. Bank of Milwaukee, 12 Wal., 193,

in which the authorities are extensively reviewed. and the decision announced that payment by a drawee to the payee of a bill of exchange who had discounted the same, is made in pursuance of a legal obligation, and that the money so paid cannot be recovered back—at least unless the payee has been guilty of fraud. We supposed that, if the drawee showed fraud on the part of the payee, such as would constitute a defense on the part of a drawee to an acceptance of a bill, the money paid might, perhaps, be recovered back, and that the declaration in this case was drawn upon that theory. On the trial of the case, the Court proceeded on the theory that the action was brought to recover for negligence growing out of a breach of contract, and allowed the plaintiff to recover, without any shadow of proof of the specific acts of fraud charged in their declaration. Notwithstanding the view of the Court below, we believe this case is one to be decided on the principles laid down in

Hoffman & Co. vs. Bank of Milwaukee, 12 Wall., 193,

and that all that is involved in it, has been already covered by the decisions in that case, or those referred to in it, which will be fully adverted to at the close of this argument. We shall first deal with the question as looked at by the court below. This brings us to the first assignment of error, which is that the court erred in instructing the jury as follows:

"The letter of the plaintiffs of the 15th of January, and the answer to it by the cashier on the 17th of January have been read to the jury. I state to the jury that these two letters constitute a binding contract between the plaintiffs and the defendant, by which the defendant agreed not to cash any drafts drawn by Melson on the plaintiffs unless they were based on actual consignments of produce."

These four points are included in the foregoing instruction:

Firstly—That the two letters therein named constitute a contract.

Secondly—That as a matter of law they make a contract between the plaintiffs in the suit and the defendant.

Thirdly—That the contract made was not to cash any drafts drawn by Melson on the plaintiffs unless they were based on actual consignments of produce.

Fourthly—That the act of the cashier in writing the letter of the 17th of January, 1876, bound the bank by contract.

Chapin vs. Taft, 18 Pick., 379.
Poignard vs. Smith, 8 Pick., 277.
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Thirdly—That the contract made was not to cash any drafts drawn by Melson on the plaintiffs unless they were based on actual consignments of produce.

Fourthly—That the act of the cashier in writing the letter of the 17th of January, 1876, bound the bank by contract.

We take exception to each one of the four points, deny that the said letters made any contract at all, deny that if they did make a contract, that the contract was with the plaintiffs, (who were not in existence as a firm when said letters were written), deny that if any contract could be predicated on said two letters, that the contract was as stated by the court, and deny that the cashier could have made such a contract for the bank.

What was there in the letter of January 15th to serve as the foundation of a contract? Melson had, long prior to the date thereof, been the agent of the firm of Hall, Patterson & Co. at Quincy, Illinois. As such agent, for three years, he had been drawing drafts on them and getting them cashed at the First National Bank, which Hall, Patterson & Co. had always paid on presentation. At last one of Melson's drafts is returned to the bank unpaid, and out of that draft a controversy arose between the bank and Hall, Patterson & Co. Following closely thereon, Hall, Patterson & Co. write the letter of January 15th, 1876, which is as follows:

"CHICAGO, *January*, 15th, 1876.

U. S. PENFIELD, *Cashier*,
Quincy, Ill.:

DEAR SIR: Hereafter we will only pay drafts on actual consignments. We cannot advance money a week in advance of shipments. The stock must be in transit so as to meet draft same day, or the day after presented to us.

This letter will cancel all previous arrangements of letters of credit in reference to W. G. Melson. Please acknowledge receipt of this and oblige. Yours respectfully,

HALL, PATTERSON & CO."
(Record pp. 33, 34.)

From the statements in this letter the existence of outstanding letters of credit is apparent, under which their agent had been doing business with the bank. The bank is notified that they are cancelled. And why? For a reason that the letter itself gives, viz: that the writers do not want to advance money a week in advance of shipment. For that reason they have determined that they will thereafter only pay drafts on actual consignments in transit, so as to meet the draft the same day or the day after it should be presented for payment. Having dealt with the bank on the basis of a broader authority, it became necessary for their protection that notice should be brought to the bank of the restriction engrafted upon the authority of their agent. That no more drafts should be cashed on the strength of other letters of credit, given by Hall, Patterson & Co. to the bank, outstanding letters of credit had to be cancelled, and notice of that fact brought to the bank. What other object had the letter of the 15th of January, but to inform the bank of the limitation Hall, Patterson & Co. had seen fit to add to the authority of their agent, and to bring to its knowledge a notification of outstanding letters of credit? The letter in question lacked the first elements of contract. It notified Penfield, the cashier, what Hall, Patterson & Co. would not do, viz: pay drafts uless drawn on actual consignment. It did not ask Penfield or the bank to do, or abstain from doing anything; it made no proposition to them, it did not even tell them that anything was expected of them.

Under this state of facts, Penfield, in response to the request contained in Hall, Patterson & Co 's letter of the 15th of January, acknowledged its receipt, in a letter, as follows:

"QUINCY, ILL., *Jan'y 17th*, 1876.

Messrs. HALL, PATTERSON & Co.,
Chicago.:

DEAR SIRS: Your favor 15th received. I note what you say. We have never knowingly advanced Melson any money on stock to come in. Have always supposed it was here in transit. Have always taken his word. After this we shall require ship'g bill.

Very truly yours,

U. S. PENFIELD,
Cashier."
(Record pp. 35,36).

How an assent on the part of the bank could have been given by the letter of the 17th of January, to a proposition not contained in the one to which it was a reply, is difficult to understand. How a concurrence of two minds upon an agreement, that the bank would cash no drafts of Melson's, unless based on actual consignments, could have followed as a matter of law from it, without a request or proposition to that effect being made in the letter, to which it is a reply, we cannot see. The letter of Hall, Patterson & Co., dated January 15th, 1876, had served its purpose, when it had conveyed notice to the bank of the change of Melson's authority, and of the modification in their credit to him. It was a mere declaration to Penfield, the cashier, of an intention on their part not to cash drafts unless based on consignments, an intention which they had a right to change and did change, when they paid four of the drafts in evidence below, (as testified by Frank D. Patterson, one of the defendants in error), with the knowledge that they were not drawn against stock, and a fifth one on that supposition, all of a later date than Jannary 17th, 1876. (Record pp. 50, 52, 53). As the foundation of a contract, asking nothing of the bank, it was without effect; and for the want of anything to assent to, obligatory on the bank, the letter of reply of January 15th, 1876, did not close ~~the~~ a contract. And this is true, notwithstanding the use of the words in that letter, "After this we shall require ship'g bill."

These words could not be treated as an assent to anything, for as we have seen, the bank was not asked to do anything by the letter of January 15th, 1876, and for the further reason that what is said about requiring shipping bills, is not responsive to anything contained in that letter.

But, if such construction of the letter of January 15th, 1876, were possible as to consider it a request to the bank to see that there was an actual consignment of stock before it cashed any of Melson's drafts—not for its own protection, but for the protection of Hall, Patterson & Co. —still the reply as to taking shipping bills, was not an acceptance of, or assent to such request.

Where an agreement is sought to be established by means of letters, such letters will not constitute an agreement, unless the answer be a simple acceptance of the proposal, without the introduction of any new term.

1 Chit. on Con., (11th Am. Ed.), p. 15.

The answer of Penfield was not an acceptance of a request to see that there were actual consignments. What he replied that he would do was that he would require shipping bill. There is a wide difference between agreeing to take a shipping bill or bill of lading, and an agreement to see that there were actual consignments.

An agreement to see that there was an actual consignment would only be answered by seeing that there was such consignment. An agreement

to take a bill of lading would be answered by taking in good faith, a forged or fictitious bill of lading, an instrument purporting on its face to be a bill of lading, even were there no consignment of property.

Leather vs. Simpson, Law Reports, 11 Eq. Cases, 401.
where a draft was presented by the Union Bank to the drawee for payment, with a memorandum attached, as follows: "The bank hold bill of lading and policy for 251 bales of cotton." The draft was paid by the drawee without seeing the bill of lading. The bill of lading was found to be a forgery, and the memorandum was held to mean no more than that the Union Bank had what purported to be a bill of lading on its face.

But we think that no further suggestion to show the difference between bills of lading and shipping bills necessary than this. The declaration in the case counts on a promise to take shipping bills. Reverse the position of parties. Suppose the bank were sueing Hall, Patterson & Co. on their promise to pay drafts, contained in the letter of January 15th, 1876. Suppose an employee in a railroad company had issued a bill of lading without any stock being shipped—a fictitious bill in other words, could recovery have been had on this statement of facts? Would not Hall, Patterson & Co. have insisted that, to recover on that promise the bank must prove a consignment in fact and in reality? They certainly would. The taking of a bill of lading then is one thing, the consignment quite another. It would follow from the proposition just considered and the case last cited, that the letter of January 17th, 1876, was not a simple acceptance of a proposition, if proposition there was, in the letter of January 15th, 1876, as to consignments. The letter of reply of January 17th, 1876, introduced a new term and proposed something different, viz: the requiring of bills of lading only, hence no assent of minds to the same thing and no contract.

Again, while the words "shall require shipping bills" do not evidently assent to any agreement, having its foundation in the letter of January 15th, 1876, said words can not be treated as a distinct and independent proposition, emanating from the bank, from which a contract might result, because the letter of the 17th of January, 1876, was never replied to orally or otherwise. (Record, p. 57.)

A man may not voluntarily comply with the conditions of a contract, without having previously assented to it.

Johnston vs Fessler, 7 Watts, 48.

A mere mental determination to accept will not suffice.

White vs. Corlies et al., 46 N. Y., 467,

Hence there was no legal acceptance of any proposition in this view of the case, and this is so for the further reason that there is nothing in the correspondence to indicate that any such thing was intended.

But that contract should not as a matter of law have been predicated on the two letters of the 15th and 17th of January, 1876, is apparent from this consideration. The letters do not, either separately or together, show the duration of the contract, supposing one to have been made; nor do they show anything as to kind, quantity or value of stock. If anything was made obligatory upon the bank by these letters, how can a court affirm as a matter of law that the obligation continued in force from January until December, 1876? If anything was made obligatory on the bank by said letters, as to shipping bills, for anything contained in these letters a shipping bill representing one steer or a dozen hogs would have fulfilled that obligation as well as one representing a large number. There is not enough in the said two letters to make a contract, as a matter of law, in any view of the case. And on such a correspondence

the law can not, against the intention of the bank to be bound at all, say that it was bound, much less bound to do any particular thing.

The reasons why the letter of the 15th of January, 1876, could not be regarded as the origin of a contract, having been indicated, this view is rendered the more apparent by the answer that must be given to this question.

What, in the light of the authorities, was the letter of Hall, Patterson & Co. of January 15th, 1876, notifying Penfield that they would not pay drafts except on actual consignments?

In Schimmelpennich vs. Bayard, 1 Peters, 264, the question is treated as one of agency. In that case, N. & J. and R. Van Staphorst were commission merchants, at Amsterdam, and being desirous to extend their business, they sent one Mr. Delaprat to the United States as their agent, to represent them and secure shipments to them. A contract was entered into between the Van Staphorsts and their agent, the principal object of which the court say, on page 285, was to define Delaprat's authority and to regulate his conduct as agent. The Van Staphorsts sent a copy of this contract to Le Roy, Bayard & Co., bankers, at New York, where a credit was given said Delaprat and where he was expected to get the drafts cashed, which he might draw on his principals against shipments. The agency of Delaprat continued for several years. His authority, as in the case in hand, was varied from time to time by letters of instruction from his principals to himself. During the continuance of the agency, Le Roy, Bayard & Co. and the Van Staphorsts were in frequent correspondence with each other, and the former were thereby informed from time to time of the authority enjoyed by Delaprat. In executing his authority as agent in drawing drafts, Delaprat drew drafts, as did Melson in the case in hand, on his principals in his own name, and the court say upon the subject of the mode of executing his authority (p. 285): "The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor, which was raised by the bill." The question arising on some of Delaprat's drafts on his principals which were protested, the rights of the parties are discussed by the court on the theory of an agency, and are settled on the basis of the law of agency. The facts of the case are so similar to the one in hand that we believe the principles applicable to that case must govern in this.

In Murdock et al. vs. Mills, 11 Metc. [Mass.] 13, one Baker, residing at New Orleans, was authorized by letter from the defendants to procure consignments of cotton to them, and to make advances by drawing drafts upon them, which bills they engaged to accept. Some drafts drawn by said Baker were unpaid by the defendants and suit was brought upon them. The Supreme Court in speaking of Baker speak of him as though he might be treated either as agent or a correspondent acting under a letter of credit. They say (page 13):

"Whatever name is given to Baker, whether he is called an agent or a correspondent acting under a letter of credit, his authority was limited and special. It was not necessary to decide which he was in that case.

In Story on Agency, § 81, this class of cases is dealt with as being cases of agency.

The letter of January 15th, 1876, of Hall, Patterson & Co. to Penfield, the cashier, in the light of these cases, was a letter of notification of the restriction imposed on their agent's authority. Questions growing out of it are such as concern the law of agency, not contract.

But if said letter of January 15th, 1876, was anything different from a notification of the authority of an agent, then it was a mere letter of credit, conferring a limited authority, an instrument with which and the

rights and liabilities incident thereto the commercial world is familiar. And Hall, Patterson & Co. must have so regarded it, for its object was to give Melson a new credit, and, as they say at the end of the letter of January 15, 1876, to cancel all arrangements of letters of credit for W. G. Melson. Such letters of credit have been adjudicated upon in many cases, and among them the following:

Bissell vs. Lewis, 4 Mich., 454.

Lonsdale & Gray vs. Lafayette Bank, 18 O., 126.

Merchants' Bank vs. Griswold, 72 N. Y., 477.

Murdock et al. vs. Mills, 11 Metc., 13.

In Bissell vs. Lewis, 4 Mich., 454, in considering the liability on a letter of credit in a suit by the holder of a bill of exchange against the writer, upon the supposition that the letter of credit only gave authority to draw to pay consignments, the court say-

"If such is the legal effect and meaning of the instrument, this conclusion is inevitable It would be a special limited or conditional authority, and the burden of proof would rest upon the plaintiff to show that Fitch in drawing the bill acted within the limits of the authority given. There is no dispute as to what is the law in such a case." The court then says that no draft would bind the drawers unless drawn within the prescribed condition.

To same effect is a summing up of the law upon this class of letters of credit in

Murdock et al. vs. Mills, 11 Metc., 13.

The other authorities above cited are to the same effect. The question is treated in all the decisions we find on this class of letters of credit as one of authority, and not as binding the person cashing a draft on the faith of such a letter to any thing. As the right to draw is acknowledged by payment of a draft by a drawee, the question as to whether the authority conferred by a letter of credit has been followed, has arisen in suits against the writer thereof by holders of unpaid bills. In none of the cases is the law decided to be as was on the trial of this case, assumed by the court, viz: that the holder of a conditional letter of credit guarantees the fulfillment of the condition by the drawer when cashing one of his drafts. The holder of such a letter of credit owes the writer thereof nothing. By the receipt of such a letter, the holder comes under no obligation to the writer by contract or otherwise. The only necessity for the holder's ascertaining whether the condition has been fulfilled, is his own protection. The penalty for his omission would be that in case of the refusal of the drawer to pay a draft, the holder could not recover on his letter of credit. In the case in hand, then, the letter of January 15th, 1876, written by Hall. Patterson & Co., if anything more than a notification of a limitation of an agent's authority, was an ordinary letter of credit, conditional, perhaps, in its nature. By its receipt the bank incurred no obligation to the firm of Hall, Patterson & Co. The bank might or might not ascertain that there were consignments Whether it did or not was a question for it to determine for its own protection alone—not for anyone's else.

Now as to the use of the words, "After this, we shall require ship'g bill," in the letter of reply, dated January 17th, 1876, the question being one of authority to draw, and their use is very natural under the circumstances. The bank must do something for its own protection. Melson's authority being curtailed, the bank could not deal with him as before. Penfield naturally declares his intention to take shipping bills or bills of lading in the future, and that intention there was nothing to prevent his changing at any time. That that act would be for

the bank's own protection, would be the only conclusion from his statement. The use of the word "*require*" strengthens this view of the case. Had he been acting for Hall, Patterson & Co., in view of the notification on the letter head of their letter of January 15th that drafts on them must he accompanied by bills of lading, (Record, p.33), Penfield would have said 'take" not "require" shipping bills, and they would have gone forward with the drafts in every case.

Upon all the decisions, treating the letter of January 15th, 1876, as a letter of credit the questions arising on it are only those concerning an authority to draw, but an authority to draw might exist outside the letter of credit. That the right to draw the two drafts in controversy did exist, is proven conclusively by the payment thereof.

But even if it were possible to regard the letters of the 15th and 17th of January, 1876, as making a contract, that could only be done on proof of the intention of parties. The words, "we shall require shipping bill," in the cashier's letter of the 17th of January, 1876, is certainly susceptible of meaning that shipping bills would be required for the Bank's protection and not for the protection of any one else. The Court should in no view of the case, have construed those words as meaning for Hall, Patterson & Co.'s protection. The meaning of the words, "shall require shipping bill," the sense in which they were used, should have been left to the jury, this being a commercial correspondence,

In Lucas vs. Growing, 7 Taun., 164, the question was on the sense in which the term "when duly honored" was used.

Gibbs, J. C. in his opinion says:

"The question whether the phrase "when duly honored," means when they were accepted or when they were paid, was a question not so much for the consideration of the Court as of a jury."

Dallas, J., in the same case: "I am of the same opinion. This was a case particularly fit for the jury."

In Brown & Co. vs. McGraw, 14 Peters, 493, 494, this same course is approved.

Hoping, however, that we have shown that the Court erred in determining as a matter of law, that the letters of the 15th and 17th of January, constituted a contract, we come to our second point involved in our first assignment of errors, viz: the right of the Court to instruct as a matter of law, that said two letters made a contract between the bank and the plaintiffs in the suit.

The admitted facts of the case are, that the firm of Hall, Patterson & Co., with which the bank had been dealing during 1874, 1875 and up to April 1st, 1876, was composed of S. Frank Hall, Frank D. Patterson and Augustus L. Patterson, (three of the five plaintiffs below. That on April 1st, 1876, more than two months after said letters were written, these three persons took into partnership, Martin V. Frazee and Jefferson E. Greer, snd a new firm composed of five persons was then formed, which carried on business under the old firm name of Hall, Patterson & Co., and continued in existence till after the bringing of this suit. (Record pp. 30, 31.) Frazee and Greer, the two additional members of the new firm, had, prior to April 1st, 1876, been in the employ of the old firm as clerks. It was proven that no notice of the change in said firm was ever brought to the bank, and that said bank never, prior to the time when Hall, Patterson & Co. paid the two drafts of December 7th, 1876, on which this suit is founded, had any knowledge or information that said change of firm had taken place. (Record p. 58). There was no evidence that there had been any publication of notice of dissolution of the old firm, or of the formation of the new one. We hold the Court erred on this evi-

dence in deciding as a matter of law, that the two letters made a contract with the plaintiffs in this suit (the defendants in error).

In Dicey on Parties, * page 152, it is said: "Suppose again that a debt is due to the firm of *A. & B.* and that *C.* joins them as partners, A., B. & C. may sometime sue X., the debtor, for the debt due to the old firm of A. & B. But they can do this only where X. has either expressly, or by his conduct, contracted to pay to the new firm of A., B. & C., the debt due the old firm of A. & B. A., B. & C. therefore sue not in respect of the debt due to A. & B., but in respect of a new contract made with A., B. & C. after C. joined the firm.

In Parsons, on Partnership (3d Ed.), page 358 (marginal page * 330) it is said: "And it is, moreover, an unquestioned rule, that no agreement between partners can alter the liability of their debtor, without his assent * * * *. If, however, the assent of the debtor sufficiently appear and be on a good consideration, an action may be maintained by the partner who is assignee in his own name. When such valid assent is given, the action by the assignee in his own name, is upon a new contract, substituted for the old one, on principles similar to those of novation: the discharge of the debtor from his liability to the firm forming the consideration of the new promise, and in note '*t*,' it is said this new promise may be express or implied."

In Horbach vs. Huey, 4 Watts., 455, it is held in a partnership case that the original relation of debtor and creditor can not be changed without the consent of the debtor.

If there was any contract at all, it was made at the time the reply of January 17th, 1876, was made, and with the old firm. The indebtedness, if any, for its breach, relates back to the 17th of January, 1876, and ante dates the existence of the firm suing below. The authorities cited show that the plaintiffs below (the new firm) could not sue upon that contract without proof of a novation on a sufficient consideration. That promise might be express or implied it is true. But how could there be either, if the Bank had no knowledge or information of a change in the firm.

In Tiernan vs. Jackson, 5 Peters, 597, this court in speaking of *choses in action*, say:

"The general principle of law is, that choses in action are not at law assignable. But if assigned, and the debtor promises to pay the debt to the assignee, the latter may maintain an action for the amount against the debtor, as money received to his use. Independent of such promise, there is no pretense than an action can be sustained. Have Tiernan & Sons, since notice of the present assignment, made any such promise to Johnson (the assignee.)

This last case shows that the inquiry must be as to a promise expressly made or implied from acts done *after knowledge of the change of firm* received by the debtor.

In Wilsford vs. Wood, Esp., 182 an incoming partner was not allowed to sue in an action on a contract made prior to his entry, although by agreement between themselves the time of commencement of their partnership was to relate back to some point before the contract. The court placed the decision on the ground that the partners could not by such an agreement among themselves give a right of action which did not subsist at the time the contract was made,

We believe the principles announced in the foregoing citations govern this case.

To further support our position on this point, suppose the bank had had to sue on the letter of credit of January 15th, 1876, on drafts cashed by it for Melson. Could the bank have sued the new firm on the basis

that the letters made a contract with that firm? If, as a matter of law, the letters made a contract between the plaintiffs below and the bank, as the court below said, then such suit could have been maintained, otherwise not.

In Boyce vs. Edwards, 4 Pet., 120, this court has said in a like case the bank could not have done so.

Parsons on Partnership, 3d Ed., pages 332, 333, says not.

On page No. 332 this author says a change of firm would discharge a simple guaranty.

On page No. 333 this same author says: "From the cases cited in the last paragraph and from the nature of a partnership, we should draw the general conclusion that a bargain with a firm expires with the dissolution of the firm or any change in it, and is not assignable or transferable by the firm to one of the partners or a stranger.

The letter of credit of January 15th, 1876, is not unlike a guaranty. At least, it is clear that the bank could not have recovered on that letter in a suit against the new firm, on the ground that that letter and the reply as a mere matter of law made a contract with the new firm of Hall, Patterson & Co.

We think, therefore, the court erred in announcing that the two letters of January 15th and 17th, 1876, as a mere matter of law, on the evidence in the case—the bank denying knowledge or information of any change in the firm—made a contract between the members of the new firm and the bank, and that the plaintiffs, the new firm, could sue thereon.

If the authorities we have just cited establish the position that the Court could not say as a matter of law, that the letters of January 15th and 17th, 1876, made a contract with the plaintiffs below (the defendant in error), it can make no difference that the action is tort. That the tort, if any, in this case, grows out of contract is shown in the declaration, which counts on a promise of the Bank to take shipping bills. (Record pp. 9, 12, 14. The rule in this class of cases is that no person can sue for a tort growing out of contract, unless he was a party to the contract.

In Sher. & Redfield, on Neg., § 54, it is said: "Negligence, which consists in the breach of a contract, will not afford ground for an action by any one, who is not a party to the contract, nor a person for whose benefit it is avowedly made." The writer then adds: "But where in omitting to perform a contract, either in whole or in part, one does an act which would be wrongful, even if no such contract had been made, he is liable to any person proximately injured thereby."

In 1 Addison, on Torts, Wood's Ed., § 27, it is said: "Whenever an action of tort is founded on contract, an action is maintainable for nominal damages, although no actual damage be proved: but the plaintiff who brings the action must be a party to the contract, for no person can in general sue in respect of a tort founded on contract who was not a party, or privy to, *and could not have been sued on the contract.*"

In 2 Add., on Torts, (Wood's Ed.), § 1288, the same doctrine is announced.

In Wharton, on Neg., § 438, the same principle is announced in another form. It is there stated tha tthe confidence must be immediate or the action fails. "In other words," says the author, "there must be casual connection between the negligence and the hurt, and such casual connection is interrupted, by the interposition between the negligence and the hurt, of any independent human agency." Further on in the same section in considering the question as to whether where a contractor had been employed by a city to build a bridge in a workmanlike manner, and the

city had accepted the same, a traveler, who had been injured by a defect caused by the contractor's negligence, could sue the contractor for negligence in the manner of executing the contract, the author says not, and in giving his reason explains what his meaning of casual connection is: "The reason sometimes given to sustain such a conclusion is, that otherwise there would be no end of suits. But a better ground is, that there is no casual connection, as we have seen, between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler."

The same author, in the same section (§ 438), in commenting on the decision of the Court in Winterbottom vs. Wright, 10 M. & W., 115, where a party injured, sued the contractor who had built certain carriages by contract with the Postmaster General, to recover for his injury, and where it was held he could not recover, says:

"There was no confidence exchanged between him and the contractor; and between them, breaking the casual connection, was the Postmaster General, acting independently, forming a distinct legal centre of responsibilities, and duties."

If we reason after the manner of Wharton on Negligence, the defendants in error, could not sue in tort for negligence growing out of a breach of contract, created by the letters of the 15th and 17th of January, 1876, for there was no confidence exchanged between the Bank and a firm not in existence, and the Bank never having heard of any change in the firm of Hall, Patterson & Co., such exchange was impossible.

If we reason after the manner of what is said in 1 Add. on Torts, § 27, the fact that the plaintiff did not make the contract, (supposing one to have been made), and not being parties to it, could not have been sued by the bank, in case the bank had had to sue upon it—then we reach the same result.

In Kahl vs. Love, 37 N. J (Law , 8, the defendant below, a collector of taxes, was sued by a party who complained that he was misled by a receipt given by the defendant as collector of taxes, and who sought to recover damages in consequence thereof. One ground on which the right of recovery was placed was the breach of an implied agreement resulting from his office. The Court say the contract, if any, was with the public. The Court in deciding on this branch of the case, reviewed the authorities touching upon the right of a third party to recover for negligence growing out of a contract between other paties, and concludes: So far as the plaintiff, as an individual was concerned, the defendant did not owe the duty of care in the transaction of the business in the course of which the receipt arose; and being a stranger to that business, and the contract on which it rested, he is too far removed from it to have the right to complain in a Court of Justice, on the ground that he has been injuriously affected by the careless mode in which it was transacted."

Treating the declaration in the case as the Court below seemed to, as one admitting a recovery for negligence merely, and that declaration as counting on a contract, or seeking to recover for negligence growing out of contract, the defendants in error not being parties to it, cannot sue in tort for a breach of that contract, and hence their action must fail.

Treating the declaration as seeking a recovery for fraud, the action fails for want of proof of the allegations thereof.

We now reach the third point involved in our first assignment of errors, that the court charged that the contract with the plaintiffs bound the bank to cash no drafts except on actual consignments of produce. From the correspondence of the 15th and 17th of January, if any promise

was made it was not a contract, to cash no drafts except on actual consignments. It was an agreement to take a shipping bill without any statement as to the kind, quantity or value of stock, and would have, as we have seen, been answered by taking a fraudulent or fictitious bill of lading.

Leather vs. Simpson, Law Reports, 11 Eq. Cases, 398,

and the promise as set out in the declaration, is one to take shipping bills. (Record pp. 9, 14, 15.)

The fourth point involved in our first assignments of errors, is that the correspondence of the 15th and 17th of January, 1876, regarded as a notice and an admission of its receipt, would be within the power of the cashier to receive and would be notice to the bank. Regarded as contract, and the evidence being silent as to Penfield's authority as cashier, the law will presume him to have the powers and to be charged with the duties ordinarily incident to the position of cashier.

First Nat. Bank vs. Ocean Nat. Bank, 60 N. Y., 287.

Fleckner vs. Bank of United States, 8 Wheat., 357.

In First Nat. Bank vs. Ocean Bank, 60 N. Y., on page 291, it is said:

"Courts and Judges have spoken cautiously on the subject, but the language has been uniform, limiting the responsibility of corporations, for the acts of their officers and agents, in the absence of an *express* authority to do the particular acts, to those performed in the discharge of their ordinary duties in the usual course of business, and within the sphere and scope of such duties, such are presumed to be by authority of and within the knowledge of the directors; and within the rule are included such acts as are shown to have been performed with the knowledge and implied consent of the directors, although out of the line of ordinary duty and usual course of business."

The court then goes on to say that the duties of a cashier are well understood, and recognized judicially and enumerates them.

The cashier's ordinary duties are enumerated in

United States vs. City Bank, 21 How. U. S., 364.

After enumerating these ordinary duties the court say:

The term ordinary business with direct reference to the duties of cashiers of banks occurs frequently in English cases, and in the reports of the decisions of our State court, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way." This contract involving the payment of money, the cashier's letter without proof of his authority to make it, was not binding on the bank, and the court should not have pronounced it the act of the bank, as a matter of law, on the evidence in the case.

As to our 2d, 3d and 4th assignments of error we have to say that the position of the court as announced in the portion of the charge embraced in our first assignment of errors, is reiterated in each one of said second, third and fourth assignments. The decision of the court on the portion of the charge embraced in our said first assignment, will decide our said second, third and fourth assignments of error.

We will consider our 5th assignment of error in connection with our 22nd assignment, both relating to the effect of the acts of authority exercised by Melson as agent at Quincy during 1876.

Our sixth and seventh assignments of error relate to the same general subject matter and we argue them together.

The declaration of the plaintiffs alleges the letter of January 15th, 1876, to have been written by the plaintiffs (Record pp. 7, 8). It also

also alleges the reply of January 17th of Penfield, cashier, to have been addressed and received by the plaintiffs, (Record p. 8), and sets forth a promise to the plaintiffs not to cash Melson's drafts on them, (Record p. 9), and avers a reliance upon a promise of the bank in the letter of its cashier contained, that it would not cash drafts on the *plaintiffs* unless Melson had first delivered shipping bills for stock shipped to the *plaintiffs* (Record pp. 14, 15). The plaintiffs were the five persons constituting the new firm of Hall, Patterson & Co., which came into existence two months and a half after the two letters aforesaid were written. On the trial of the cause it had been proven by Frank D. Patterson's testimony that the firm of Hall, Patterson & Co. on January 15th and 17th, 1876, and from those dates up to April 1st, 1876, was composed of S. Frank Hall, Frank D. Patterson and Augustus L. Patterson, and that the plaintiffs came into existence as a firm on April 1st, 1876, (Record pp. 30, 31).

On this state of facts the plaintiffs below offered the letter of Hall, Patterson & Co. in evidence, dated January 15th, 1876. To its introduction the defendant bank objected specifying as reasons that it having been shown by the testimony of Frank D. Patterson that on January 15th, 1876, the firm of Hall, Patterson & Co. was composed of only S. Frank Hall, Frank D. Patterson and Augustus L. Patterson, the letter was written by other persons than those by whom this suit was brought and was consequently irrelevant and immaterial in this suit; and secondly, because of the variance between the allegations of plaintiffs' declaration as to the persons writing said letter last named and the proof on this point, but the court overruled the objections of the defendant and admitted said letter in evidence, and the defendant then and there excepted (Record pp. 33, 34, 35). The admission of this evidence against the objections of the defendant is the subject of our sixth assignment of error.

The subject of the seventh assignment of error is the admission in evidence of the letter of January 17th, 1876, written by Penfield, the cashier, against the objections of the defendant.

The plaintiffs offered the reply of January 17th, 1876, in evidence, and the defendant objected, specifying as reasons:

Firstly—That it appeared from the proof in the case that this letter was addressed to other parties than the plaintiffs in the case, and was irrelevant and immaterial in this suit.

Secondly—Because of a variance in the allegations of plaintiffs' declarationas to the persons to whom it was addressed and the evidence on that point, the allegations being that it was addressed to the plaintiffs, the proof showing that it was addressed to S. Frank Hall, Frank D Patterson and Augustus L. Patterson. The court overruled said objections, and the letter was read in evidence to the jury. Exception was then and there taken to this ruling (Record pp. 35, 36, 37).

In 1 Chit. on Pleading, * page 386, it is said:

It is also a rule that if a necessary inducement of the plaintiff's right, even in actions for torts, relate to and describe, and be founded in contract, it is necessary to be strictly correct in stating such a contract, it being matter of description. Thus even in case against a carrier, if the termini of the journey which was to be undertaken be mis-stated the *variance will* be fatal.

To same effect are,

1 Chit. on Plead., * No. 383.

1 Green ou Ev., § 64.

If the letter of the 15th of January and that of the 17th, 1876, made any contract, it was not with the plaintiffs in this suit. The averments

of the declaration stated that the plaintiffs in the suit below were parties to this correspondence. On the theory of contracts, each letter should have been excluded for this variance, on the objection of the Bank; on any other theory, the letters being the basis of the action, must be correctly described or the variance will be fatal.

1 Green, on Ev., § 56.

On the other ground of objection to each letter, the irrelevancy, by reason of the difference between the parties, we refer to

Boyce vs. Edwards, 4 Pet., 120,

though there the suit was by the holder of a bill against the maker of a letter of credit.

The objections to the admissibility of each letter should have been sustained and the Court should have kept the same from the jury.

Our 8th and 9th assignments of error, are the outgrowth of the objections, we have just urged to the decision of the Court.

In our 8th assignment, we complain of the refusal of the Court to instruct the jury, at our request, in substance, that, on the theory of contract, the plaintiff in the suit could not recover on the letters of the 15th and 17th of January, A. D. 1876, for any breach of agreement thereby made. (Record pp. 85, 86). The Bank had objected to each letter when introduced in evidence for the variance, on the theory of contract—we have shown by former citations, as we think—that the new firm could not recover on any contract made by the said two letters. If our position is right in this particular, we were entitled to this instruction, for the reason that a verdict against the Bank, in favor of the plaintiffs, could not have stood.

Stuart vs. Simpson, 1 Wend., 376.

The subject of the 9th assignment of error is the question of the variance in reference to the evidence. The said letters having been offered in evidence, against the objection of the Bank, and no evidence having been offered to do away with the question of variance between the allegations in the declaration as the persons between whom the correspondence passed, the Bank's attorneys asked the Court to instruct the jury to find for the defendant, because of the variance. (Record p. 84.) If the variance was fatal, as the authorities say, having objected to the evidence, we were entitled to the instruction. The Court rejected this instruction.

As to our 10th assignment of error, we complain of the Court for refusing to instruct the jury at our request, that the allegations of the plaintiffs' declaration, charging the cashier, Penfield, with specific acts of fraud, in fact, were material, and the proof not sustaining those allegations, the verdict must be for the defendant.

The rule of law is that whatever cannot be stricken out, without getting rid of a part essential to the cause of action, must be retained, and of course must be proved, even though it be described with unnecessary particularity.

1 Green on Ev., § 63.

That these allegations could not be stricken out or disregarded, and were material, is shown at such length under Division VII of our brief, that we will only refer back to that here.

The 11th assignment of errors, complains of the refusal of the Court to give the following instruction, on the request of the defendant below:

"The form of action chosen by the plaintiffs in this case is an action upon the case. The plaintiffs cannot recover in said form of action upon the evidence before the jury in this case, and the verdict should be for the defendant."

No proof of fraud in fact was made by the plaintiffs on the trial below. Their case was made on the letters of the 15th and 17th of January, 1876; on the two drafts of the 7th of December, 1876, proof of the payment thereof, and of the non-arrival of any stock which plaintiffs expected to receive to sell for their reimbursement for having paid said drafts. The case of the plaintiffs reduced itself to a case of negligence, that negligence consisting, on their theory, in a breach of contract to take shipping bills. For mere negligence consisting in a breach of an agreement between two parties that one would cash no drafts on the other without taking bills of lading or shipping bills, we hold that no recovery can be had in an action of tort.

We hold that this follows from the nature and definition of a tort. In Cooley on Torts, p. 4, we find this definition:

"When therefore, the law of the land undertakes to declare and protect rights, and establishes a standard for the purpose, the acts or omissions which disturb or impede the enjoyment of such rights, may be treated as legal wrongs or torts, but none others can be."

In 1 Hilliard on Torts, Sec. 1, note a, citing Broome Com., 658, a tort is defined to be "a wrong independent of contract."

From these definitions it would seem to follow, that an act or omission to constitute a tort, must be one, which from its nature, the law has been solicitous to bring within its own provision, and to make provisions for, without leaving the same to await the action of parties. That such act or omission must be of public concern would seem self-evident, else the solicitude of the law would not have been exhibited concerning the same, but indivduals would have been left to make provision with reference thereto at their pleasure. Now where the parties have agreed as to the taking of shipping bills or bills of lading, whom does the arrangement concern but the parties themselves? What is it but a simple breach of contract, and if an action of tort can be brought on it, on what private arrangement, could not the like action be maintained? The very foundation of an action on the case for negligence, is the breach of a common law duty, but as a foundation for the existence of such a duty, there must be shown a state of facts, out of which the duty arises.

There can be no breach of duty unless the act or omission complained of falls within the compass of that field within which in the language of Cooley on Torts, the law of the land has undertaken to declare and protect rights and establish a standard for that purpose, — in other words, unless such act or omission constitutes a tort. That the law should have descended to providing for so essentially private a matter as the agreement of two parties, (supposing one to have been made at all, concerning the taken of shipping bills—otherwise than by giving an action for a breach of contract —we do not believe. No statute law has done so, and we do not believe the common law has exhibited its concern for such a case. Physicians, attorneys, and the different kinds of bailees, these are the classes of cases treated of in Wharton on Negligence, under the head of negligence, based on contract, and as being those in which a common law duty exists, but under none of the heads there given, could such a case as this be classed. The definition of Tort as given in Cooley on Torts—excludes the omission complained of from the list of torts. Hence, only an action of contract could have been maintained for any breach of the alleged agreement.

But if the omission complained of could be classified, under the head of torts, even then this action of case could not be maintained.

In Masters vs. Stratton, 7 Hill, N. Y. 103, the decisions as to when an action of tort may be brought and when the action must be contract, are

reviewed, and the result of the decision is announced in this way: "The general result of all the decisions is well stated in a note to Cabell vs. Vaughan (1 Wm. Saund, 291, 5th Ed.), and is in substance this: 'Where the action is maintainable for the tort simply, without reference to any contract made between the parties, no objection can be raised on the ground that the plaintiff should have declared upon the contract: as for instance, in actions against common carriers, founded on the custom of the realm and the like. But where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by showing such contract, then the plaintiff must proceed upon the contract, and a special action on the case will not lie.'" Then the Court proceeded to say: "that there was in that case no common law liability independently of what arose out of the contract; and of course no duty founded on the common law alone, and that the obligation of the defendant rested entirely on contract, and that the action of case could not be maintained."

To same effect is Corbett vs. Packington, 6, B. & C., 268.

The existence of the common law duty is the ultimate fact in cases of contractual negligence.

The contract does not create the duty, it only brings a party into the position to require its performance

Cooley on Torts, pp. 90, 91.

Testing this case by the principles of the last case, there was no ultimate common law duty as the basis of the action, irrespective of the contract. The alleged contract had to be referred to, and used as the ground of the action, and under this case of facts, case will not ~~be~~ lie

The subject of the 12th assignment of error is the refusal of the court to instruct the jury at the instance of the plaintiff in error as follows:

"Upon the evidence before the jury in this case, the plaintiffs cannot recover, and the jury should find for the defendant." (Record p. 87.) The determination of the questions we have already discussed in this argument will decide whether this instruction should have been given.

The subject of the 13th assignment of error, is the refusal of the court to allow the plaintiff in error to prove by the witness Penfield that he had never colluded with said Melson in any way, and had never knowingly done anything to deceive the plaintiffs below in any thing connected with the drafts which give rise to this suit (Record p. 60). The evidence was objected to by the attorneys for the said plaintiffs for irrelevancy and excluded by the court on that ground, and exception was taken by plaintiff in error (Record p. 60). The declaration charged that Penfield, the cashier, colluded and conspired with Melson to deceive and defraud the plaintiffs by inducing them to pay said drafts, although he, said Penfield, then and there well knew that the memoranda on the drafts were false and calculated to deceive the plaintiffs (Record pp. 11, 12). If the gravamen of the declaration is fraud in fact, as is claimed by the plaintiffs in error, the evidence offered was material, as answering a direct allegation of the declaration.

The subject of the 14th assignment of error is the refusal of the court to allow the plaintiff in error to prove by the witness Penfield, the writer of the letter of the 17th of January, that he had no intention by writing the letter of January 17th, 1876, or by any thing therein contained, of contracting to do anything to protect the interest of Hall, Patterson & Co., to whom said letter is addressed, in any way, and that by using the words shall require shipping bills he simply meant to indicate what he expected to have to do for the bank's and nobody's else protection (Record pp. 66, 67). If we are right in viewing the gravamen of the declara-

tion in the case as being the fraudulent acts of the cashier, the inquiry of good faith was an important element in the case. His understanding of his letter of the 17th of January, 1876, to Hall, Patterson & Co.—and of the obligation thereby created—would be material in the conduct of such an inquiry, provided the proof showed his actions were consistent with that understanding.

1 Whar. on Ev., § 35.

The proof shows that all drafts of Melson drawn after January 17th, 1876, were cashed without reference to consignments or shipping bills (Record p. 75). The proof, therefore, shows acts in keeping with that understanding.

The subject of the 15th assignment of error is the refusal of the court to allow the plaintiff in error to prove that after the receipt of the letter of January 15th, 1876, owing to the unwillingness of the bank—(the plaintiff in error)—to be at the trouble of ascertaining for its own protection whether drafts were drawn upon *consignments*, the bank refused to cash any more drafts of Melson on Hall, Patterson & Co., and all employees of the bank were directed to cash no more of said Melson drafts on said firm, and the business of said bank with said Melson and said Hall, Patterson & Co. was wholly discontinued by the bank. The ruling of the court on the exclusion of the evidence was excepted to (Record pp. 63, 64), It was proven that the stock yards at Quincy was some distance from the bank, down the bluff and outside the business part of the city (Record p. 58). All drafts drawn during 1876 by Melson on his firm had been admitted in evidence. Those drawn in January, 1876, showed that none had been cashed after the receipt of the letter of January 15th, 1876, till about the end of that month. To explain this break, and to allow no presumption from this circumstance against the bank, the bank desired to make the above proof and show that it did not intend to cash any more of Melson's drafts, in consequence of the trouble it would be put to to ascertain whether Melson was drawing within the authority of his letter of credit. viz: on consignments. As a step in showing the bank's good faith throughout, it was important in connection with Penfield's further testimony. That testimony showed that the business of the bank, discontinued for the reason of inconvenience, was resumed on the faith of a letter of Hall, Patterson & Co., given to him by Melson, (Record pp. 64, 65), that letter being the one whose contents the bank was not allowed to prove.

The 16th, 17th, 18th, 19th and 20th assignments of error are each made on substantially the same theory, and give rise to the same question, and will be argued together That question is whether the court should have admitted the plaintiff in error to show the prior relation and situation of the parties to this suit to each other, and admitted them to make proof of the antecedents of the letters of January 15th and 17th, 1876.

It had been proven that Melson had been the agent of the old firm of Hall, Patterson & Co. at Quincy, Illinois, during 1874, 1875, and up to the time of the writing of the letters of the 15th and 17th of January, 1876, (Record pp. 31, 32), that it was his business as agent to secure consignments of stock at said Quincy to the firm of Hall, Patterson & Co., and that these consignments could only be obtained at that point, by making advances of money to the owners thereof at Quincy; that this being the case these advances could only be made by arranging with some bank at Quincy to cash Melson's drafts on Hall, Patterson & Co., and that Hall, Patterson & Co. had arranged to have said drafts cashed by plaintiff in error (Record pp. 46, 47). It had also

been proven that said Melson never had been a depositor at the First National Bank of Quincy, Illinois, the plaintiff in error, and had only been known there as the agent of Hall, Patterson & Co., and that said Bank had had no business with him except as agent of and in connection with the business of Hall, Patterson & Co. (Record p. 60). During all this period Melson had been drawing drafts on his firm and getting them cashed there. All drafts so drawn had been paid by Hall, Patterson & Co. on presentation, except one drawn on January 4th, 1876, which had been returned protested, and out of this one, the witness, Frank Patterson testified a controversy arose by letter, between the bank and Hall, Patterson & Co., but none of the correspondence relating to the controversy was offered in evidence. (Record p. 32). Then came the letter of the 15th of January, 1876, of Hall, Patterson & Co., to the cashier Penfield, saying that they would thereafter only pay drafts on actual consignments, and Penfield's reply of the 17th of January, 1876. (Record pp. 33, 34, 35). It also appeared that all drafts drawn by Melson on Hall, Patterson & Co., and paid by them after January 15th, 1876, were sight drafts. (Record pp. 53, 54, 55). Such being the evidence, the plaintiff in error made separate offers of the two following letters:

"CHICAGO, 8, 16, 1875.

U. S. PENFIELD,

Quincy. Ill.:

Our credit to Melson is only intended to cover drafts on stock in transit or about to be shipped from Quincy, as we don't think advisable to advance money to buy stock on in the country.

Yours truly,

HALL, PATTERSON & CO."

"CHICAGO, 11, 5, 1875.

U. S. PENFIELD,

Cash. 1st National, Quincy, Ill.:

You can allow our agent, W. G. Melson, to draw on us at three days' sight and we will honor his drafts.

He wants the money to advance on stock down the R. R.

Yours truly,

HALL, PATTERSON & CO."

Had these letters been admitted, that part of the letter of January 15th, 1876, containing these words, "This letter will cancel all previous arrangements of letters of credit to W. G. Melson," (Record p. 34), would have been apparent. The two letters aforesaid offered in evidence and excluded by the Court, were the very letters of credit to be cancelled by the letter of January 15th, 1876. One of them, the former of the two, was conditional on shipments in transit; the second broadened the authority of Melson, while the letter of January 15th, 1876, put his authority back where it was left by said former letter. And if like letters with that of January 15th, 1876, were called letters of credit by Hall, Patterson & Co., themselves, why should they claim for the letters of the 15th of January, 1876, any different operation; what reason had the bank for thinking that letter any different in kind and operation, from what Hall, Patterson & Co. designated ones just like it? In this view of the case, the evidence was material.

But the letter dated, "11, 5, 1875," was admissible in this further view. The letter of January 15th, 1876, should be construed with it. The latter

is not an absolute revocation of the former. It only engrafts the condition of shipments in transit upon it. The effect of the two is to leave Hall, Patterson & Co. promising to pay three days after sight drafts on consignments.

If this was the legal effect of the two letters, and no three day after sight drafts were ever drawn, as was proven, and Hall, Patterson & Co. paid sight drafts to the amout of $50,000 after January 17th, 1876, (Record p. 73), (printed record says erroneously $5,000), the jury would have had additional evidence of a change in the arrangement, if any such was made by the letters of January 15th and 17th, 1876. The evidence would have shown that the parties had never acted at all on those letters, but had been doing business on a different basis, and the materiality of the evidence in this view is shown.

The refusal of the Court to admit the aforesaid two letters in evidence form the subject of the 15th and 16th assignment of error. The Court placed their exclusion on the ground that they were written prior to January 15th, 1876. (Record pp. 70, 71).

On the proof which we have last above mentioned on the subject of the controversy between the bank and Hall, Patterson & Co., and the testimony of Penfield, that he wrote two letters to Hall, Patterson & Co. to which he received no other reply than the letter of January 15th, 1876, (Record p. 73), the following two letters were separately offered in evidenc, and excluded by the Court. They are as follows respectively:

1st.

"JANUARY 13th, 1876.

HALL, PATTERSON & Co.,
Chicago, Ill's:

I have in hand W. G. Melson's dr'ft on you, dated Jan'y 4th, $125, protested and returned for non-payment.

This dr'ft was given for balance on shipment of stock, he having my check for several hundred dollars and paid for the stock in my presence. I would like to hear from you. I don't see how you can go back of the letter of credit I hold from you. I know nothing about this man Melson, nor have I seen him since return of draft.

Very truly yours,

U. S. PENFIELD, *Cash.*"

2nd.

"JANUARY 14th, 1876.

Messrs. HALL. PATTERSON & Co.,
Chicago:

I have this day cashed Melson's dr'ft, endorsed by Joseph Hunalt on you for $2,631.95, on 3 cars hogs & one car cattle—will be shipped in the morning as per memorandum of supt. stock yards attached to the dr'ft.

This stock is shipped for my a/c; on payment of the d'ft you will render a/c and forward balance proceeds to Joseph Hunalt, Clarence, Mo. I am at a loss to know what to make of the return of Melson's protested d'ft for $125, your ag't, and we holding your letter of credit and no explanation. For this reason have had stock shipped in my name.

Yours,

U. S. PENFIELD, *Cash.*"

The exclusion of said last two letters is the subject of the 18th and 19th assignments of error. They were admissible as antecedents of the letter of the 15th of January, 1876, and as those to which it was a reply,

and to show what the correspondence concerning the controversy spoken of by the witness Patterson, was. They were also admissible, to show that there was nothing in that controversy to change the status of the Bank to Hall, Patterson & Co.

To further show the position of parties, the plaintiff in error offered to prove, that the plaintiff in error had not at any time, prior to January 15th, 1876, nor prior to said date, had U. S. Penfield, its cashier, exercised any agency for, or stood in the position of protecting the interests of Hall, Patterson & Co., but the Court refused to allow the proof to be made. (Record pp. 68, 69). The refusal is the subject of the 20th assignment of error.

The letters of the 15th and 17th of January, 1876, should be read or construed in the light of the subject matter of the correspondence, the situation of parties and surrounding circumstances.

The four letters, and the proof offered as last aforesaid, were proper as aids in this determination.

Our 21st assignment of error relates to the refusal of the Court below to allow proof by the witness Penfield, of the contents of a letter, which said witness testified had been given to him by Melson, the said agent of Hall, Patterson & Co., between the 27th day of January, 1876, and the 31st day of January, 1876, and which was signed Hall, Patterson & Co., and was in the hand writing, as well the body of the letter as the signature, of the defendant in error, Frank D. Patterson. Said Penfield testified that said letter was delivered to him by said Melson, while he was the agent of Hall, Patterson & Co., and in connection with their business, and that he was about to file it away with the papers of the Bank, when Melson earnestly solicited the return of the same, promising if allowed to take it, he, Melson, would return it, to him, Penfield. The said Penfield then testified that Melson did not return said letter at all, and that the last he, Penfield, had seen of the letter was in said Melson's hands. (Record pp. 64, 65). There was an allegation in the declaration in the case that Melson had absconded to parts unknown. (Record p. 16). Frank D. Patterson, one of the defendants in error, had, prior to the appearance of Penfield on the witness stand, and prior to Penfield's giving the testimony last above mentioned, as also that next hereinafter mentioned, been sworn as a witness, and testified that he, Patterson, had never seen said Melson since December 6th, 1876, though he had searched for him and had visited Clarence, Missouri, where he resided, that he could not, after diligent inquiry, hear anything of said Melson, as a result of his efforts to find him, and could not hear of anybody that had seen or heard any thing of him since the evening of December 6th, 1876. (Record pp. 39, 40). This testimony being already given, the witness Penfield testified that the plaintiff in error, since the commencement of the suit, had searched most extensively, and had searched everywhere for said Melson where its officers thought or could learn that said Melson was likely to be, and had not been able to find him or said letter. It was also proven that notice to produce said letter had been served on the plaintiffs below, (the now defendants in error). The same was not produced by said plaintiffs at the trial, on request of the Bank's attorneys, and the witness Penfield was then asked: "What were the contents of said letter?" The attorneys for the plaintiffs below objected to the proof of contents of the letter, on the ground that a proper foundation had not been laid for secondary evidence. The Court then stated that proof not having been made on this trial that said letter had been destroyed, proof of its contents

was not admissible, and the Court refused to allow plaintiff in error to make said proof. To this decision exception was taken. (Record pp. 65, 66).

There were two grounds on which the proof of the contents of this letter was admissible under the foundation laid therefor.

The first was that the letter was not produced by the plaintiffs below in obedience to the notice to produce. Penfield's testimony traced said letter into the hands of the agent of the plaintiffs, where the letter was last seen, and there was no proof tracing it out of the hands of such agent or denying such agency. The possession of the agent was for this purpose the possession of the plaintiffs, and notice to the principals to produce it, was sufficient to allow secondary evidence of its contents.

1 Green on Ev. (12th Ed.), § 560 and note 5.

Sinclair vs. Stevenson, 1 Car & Payne, 582.

Baldney vs. Ritchie, 1 Starkie, 338.

Robb vs. Starkie, 2 Car & Keiran, 143.

But if the contents were not admissible on the former ground, then the proof was admissible on the ground that it had been sufficiently established that the letter was lost. The Court held that proof must be made of the destruction of the letter. Proof of loss would have entitled the bank to show its contents by secondary evidence,

1 Whar. on Ev., § 129,

or that it is out of the power of the plaintiffs in error to produce it.

1 Whar. on Ev., § 130.

It was not necessary to prove its destruction.

Treating Melson then, as a third party not in privity with the plaintiffs below, the bank had to prove loss of the letter or that it was not in its power to produce it. Absolute proof of loss is not necessary. It need only be proved inferentially.

1 What. on Ev. § 142.

The Court has only to be satisfied that it cannot be gotten at

1 What. on Ev., § 141.

United States vs Reyburn, 6 Pet., 364.

Now it was already in evidence that Frank D. Patterson had searched for Melson and he had not been able to find him or learn of his whereabouts, or find any body else who had seen him, (Record pp. 39, 40), when Penfield came upon the stand and testified that the bank, ever since this suit was instituted, had searched most extensively for said Melson and everywhere where its officers thought or could learn he was likely to be. (Record pp. 65, 66). The proof showed a loss to the bank as real as though the letter had been burnt up before the eyes of the cashier. It certainly proved that it was out of the power of the bank to produce it

In United States vs. Reyburn, 6 Pet, 364, it was proven that one, Chase, stood indicted for a misdeameanor, that a bench warrant had been repeatedly issued out against him, that he could not be found and that the process was always returned *non est investus*. Secondary evidence of the proof of the contents of a commission in the hands of Chase was admitted. This Court, in deciding as to the admissibility of the evidence say:

"We think the objection in this respect not well founded; but that the case falls within the rule that when the non-production of the written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be shown. This is a general rule of evidence applicable to criminal as well as civil suits * * *

In Moody vs. Commonwealth, 4 Met. (Ky.)4, the fact of the existence

of the civil war and the absence of Major Terrill in the army of the United States in Kentucky, was held sufficient foundation for secondary evidence of letters last seen in his possession.

That the foundation was sufficient to authorize proof of contents of the letters under the facts of the case, we believe shown by the foregoing authorities.

The materiality of the proof cannot be questioned. The proof the bank offered to make as to the contents of the letter, which the Court refused to allow, was as set forth in the 21st assignment, in substance that the letter was addressed, "To all whom it may concern," and bore date about January 28th, 1876, and certified that said Melson was the agent of Hall, Patterson & Co. for Quincy and North Missouri, and that as such agent, said Melson was authorized to draw sight drafts on said Hall, Patterson & Co. generally, and that all drafts drawn by him on them during 1876, would be paid by them." (Record p. 66.)

The whole of the charge of the Judge on the trial below, is in the bill of exceptions. (Record pp. 88, 89). The Court in a portion of the charge not excepted to, submitted the question to the jury as to whether there had been a change in the arrangement of the 15th and 17th of January, afterwards made by the agreement of parties. (Record pp. 88, 89). The contents of the said letter, had the Court allowed proof thereof, would have had a decided bearing upon this point. It would have shown a revocation of any contract made by those letters, by the firm of Hall, Patterson & Co. itself, or on the theory of agency, an increased authority in the agent. It would also have shown that the bank acted throughout in good faith, and would have left room for the application of the principle that where it is a question of who shall bear a loss as between two parties deceived, he who puts confidence in and employs the person practicing the deception, should bear the loss rather than the other party.

The subject matter of the 22d assignment of error is the refusal of the court to allow proof of the acts of Melson as agent of, and the extent of the authority exercised by him in and about the business of, Hall, Patterson & Co. at Quincy, Illinois, during 1876. The court instructed the jury, as we have seen, that the letters of the 15th and 17th of January, 1876, made a contract, but there being evidence tending to prove a change in the arrangement, left it to the jury to say whether the arrangement was changed by agreement of the parties (Record p. 89). The plaintiff in error having proven by a witness, Boyer, that during 1876, at Quincy, Illinois, the acts of Melson as Hall, Patterson & Co.'s agent were as follows: When possible he induced parties who came to Quincy with their stock unconsigned to any one to consign it to Hall, Patterson & Co. If he could not get it consigned without making advances, he would make advances to the owners at Quincy. Sometimes he would buy stock outright for the sake of getting it consigned to his firm. He often did what that witness called releasing stock during 1876 at Quincy. The releasing stock consisted in this: Stock would be put on the train in North Missouri and would be consigned there to Hall, Patterson & Co. The owner would come along with it, and Melson and the owner would decide that a sale could be made at Quincy as favorably as to carry it to Chicago. The railroad company carrying it would not give up the stock, and release it from the consignment, without the consent of the consignee, Hall, Patterson & Co. and Melson, as their agent, always gave the consent of the firm and the stock was released by the railroad company. The stock so released Melson would sell at Quincy and take the proceeds (Record pp. 75, 76). The court instructed the jury that this testimony of Boyer

did not tend to prove that there was any revocation of the letter of January 15th, 1876, (Record p. 94 , and this instruction forms the subject of our fifth assignment of error, but as it concerns Melson's acts we consider it here. Such being the state of the case, the plaintiff in error offered to prove as follows:

That said Melson during 1876 and down to Deeember, 1876, at Quincy, exercised all the authority about the business of Hall, Patterson & Co., with the knowledge of defendant, that said Hall, Patterson & Co., or any member of said firm could have done themselves if personally present in Quincy The court excluded this evidence for irrelevancy and incompetency.

Firstly—Should the court have instructed concerning the testimony of the witness Boyer as above stated. The proof tending to show revocation was the following. The drafts in evidence showed that from the receipt of the letter of January 15th, 1876, until about the close of the month, the bank cashed no drafts of Melson's at all (Record p. 61). It was proven that Melson in a letter to Hall, Patterson & Co., dated Quincy, January 27th, 1876, had notified them that Penfield would cash no more drafts in consequence of their letter of January 15th, 1876, and had asked them to countermand that letter and to reply by return mail (Record pp. 79, 80). It was proven that Melson a few days after this left with Penfield a letter written by Hall, Patterson & Co., and that the business of cashing drafts was immediately revived and went along as before (Record pp. 64, 65). It was also proven that all drafts drawn by Melson and cashed by the bank, went forward for presentation to Hall, Patterson & Co , and were paid by them, without shipping bills or bills of lading attached and without their inquiring concerning the same, (Record p, 56), notwithstanding the letter head of the letter of January 15th, 1876, directed that drafts on them must be accompanied by bills of lading, (Record p. 33), and it was also proven by one of the firm of Hall, Patterson & Co. that after the letter of January 15th, 1876, they paid certain of Melson's drafts, knowing they were not drawn against stock, (Record p. 50) and also that after the change of firm on April 1st, 1876, the letter filed January 1st, 1876, in the Quincy stock yards, and containing no limit to Melson's authority, was left there unchanged (Record p. 49). Boyer's testimony showed acts of Melson as agent which would be done ordinarily only by a general agent. Why, on the theory of contract did not these facts in connection with other facts proven, tend to show a broadened authority, and an ahandonment of the letter of January 15th, 1876? The jury should have been left to judge of the effect of Boyer's evidence, and not told that it did not tend to prove a revocation. On the theory of an agency, it was also material testimony. This much as to the fifth assignment.

Secondly—As to the exclusion of the evidence complained of in the 22d assignment of error, the bank should have been allowed to prove that during 1876 and down to December, 1876, Melson at Quincy exercised all the authority about the business of Hall Patterson & Co. with the knowledge of the bank, that Hall, Patterson & Co. or any member of the firm could have done if there present.

If Melson exercised the whole authority of his principles for nearly a year, about their business at Quincy, Illinois, with the knowledge of the Bank, the fact of a change in any arrangement resulting from the letters of January 15th, 1876, was to be determined by what he did, as far as the Bank was concerned.

Hall, Patterson & Co , could not have allowed him to exercise unlimited authority about their business in Quincy, including that at the

Bank for a year, and then on the happening of a loss, say that they had not changed the terms of a letter like that of January 15th, 1876. Again, in determining upon the question submitted to them by the Court, viz: the change of the arrangement made by the letter of January 15th, 1876, from proof of unlimited authority in every feature of Hall, Patterson & Co.'s business, the jury would have been justified in inferring a change in the term of said arrangement, and in this view the evidence should have been admitted.

On the theory of agency, the evidence was certainly material.

Story on Agency. § § 81, 79.

Schimmelpennich vs. Bayard, 1 Peters, 290.

As to the twenty-third assignment of error the witness Frank D. Patterson, in a running narrative, testified as to a conversation that occured between him and Penfield, the cashier, after the occurrence of the loss, which resulted from the payment by Hall, Patterson & Co., of the two drafts on which this suit is founded. He said that Penfield told him he thought they would get their money; that he thought it would be paid, and that witness, Patterson, might go back to Chicago, and that the money would be sent them, he, Penfield, thought. The refusal of the Court to exclude this evidence, on motion of the counsel for the bank, at the trial below, (Record pp. 45, 46), is the subject of the 23d assignment of error. It is certainly no part of a Cashier's ordinary powers, to adjust or settle claims against the Bank, and Penfield testified that the management of the claim belonged to the directors and the Bank's attorneys. (Record p. 62.) Penfield, it is true, denied that he made the statements Patterson testified to, but the Court should not have allowed the evidence of Patterson, on that point, to go to the jury. Once let a jury get the idea that the cashier had told one of the defendants in error that they would get their money, and their minds would soon be made up against the defense made by the Bank. The Court submitted the question to the jury as to whether the agreement had been changed. If they believed, Patterson, their opinion on the question of change would be made up adversely to the Bank at once on this case.

The subject of the 24th and 25th assignment of errors, involves the same question and will be considered together.

The 24th assignment complains that the Court allowed S. Frank Hall, one of the defendants in error, to answer the following question:

"Did you ever in any way authorize said Melson, after January 17th, 1876, and during said year, to draw drafts on Hall, Patterson & Co., except upon actual shipments in transitu."

The plaintiff in error objected to the question when put to the witness, on the ground that that was a question to be determined by the jury from all the evidence in the case, and therefore not a question for the witness to express his conclusions upon. The Court overruled the objections of the plaintiff in error, and allowed the witness to answer, and exception was taken to that ruling. The witness answered: "I never did." (Record p. 81.)

The subject of the 25th assignment is that the other four defendants in error were each put upon the witness stand, asked the same question as that propounded to the witness Hall, and last above mentioned, under the same objection and exception as last aforesaid, each of them answering said question thus:

"I never did." (Record pp. 81, 82).

The Court submitted the question to the jury as to whether there had been any change by the agreement of parties, in the contract made by

the letters of the 15th and 17th of January, 1876. (Record pp. 88, 89). The plaintiff in error did not seek to prove such change by direct evidence, but from facts and circumstances. The question of any change was for the jury on the evidence in the case, and the effect of the question was to make the witness usurp the province of the jury.

Hoener vs Koch, 84 Ill., 409.

Chicago & Alton R. R. Co. vs. Springfield & N. W. Co., 67 Ill., 146.

Atlantic & Great Wes. R. R. vs. Campbell, 4 O., S. 585.

The case went to the jury with the positive statement of each of the defendants in error before them that he had never in any way done any thing to authorize Melson after January 17th, 1876, and during said year, to draw drafts on Hall, Patterson & Co., except upon actual shipments in transitu. In the face of this direct testimony, it would have been next to impossible to convince the jury, by facts and circumstances, that there had been any change by agreement of parties. As against the positive statements of these five parties to the suit, facts and circumstances would have had no weight with a jury. That the bank was harmed by this evidence is beyond question.

The subject of the 26th assignment of error is the following: The court allowed the witness Frank D. Patterson to testify as to the contents of a telegram sent by Hall, Patterson & Co. to Penfield, cashier, and as to the contents of his reply. The only foundation laid was this: Frank Patterson testified that he had no copies of the telegrams or the telegrams themselves; that telegrams became such bundles that they were thrown into the waste basket; that he had inquired at the telegraph office and that he ceuld not get copies; that it was the practice to destroy telegrams six months old. That Mr. Goff, the manager at Chicago, told him so. Mr. Goff's declarations were objected to by plaintiff in error as inadmissible. On this foundation proof of contents was allowed by the court. No noticc to produce any telegrams or copies was served on plaintiffs in error, as will appear in the notice served, which is set out in the record (Record pp. 42, 43, 44).

The declarations of Mr. Goff were not ~~proof~~ to prove loss of dispatches and that he should have been produced as witness.

Chapin vs. Taft, 18 Pick, 379.

Poignand vs. Smith, 8 Pick, 277.

King vs. Denio, 7 Bar & Cres., 620.

Mariner vs. Saunders, 5 Gil. 120.

Becker et al. vs. Quigg, 54 Ill., 395.

1 Whart. on Ev., § 175.

Without entering into a discussion as to which were originals in this case, the rule requires the message left at the telegraph offices to be produced, if on no other ground, because it is the best kind of secondary evidence.

1 Whart. on Ev., § 76, notes and cases cited.

If that be lost, oral evidence of contents may be given. But the statements of Goff were not admissible to prove their loss against the objections of the bank. For this reason and the want of notice to produce, no proper foundation was laid and the proof of contents should have been excluded. The witness Patterson testified thah his firm telegraphed Penfield to know where the stock was and that Penfield replied that it had gone via Hannibal. Penfield denies this, but the evidence should not have gone to the jury. Patterson said he could not tell whether the telegrams passed before or after payment of the drafts. His testimony left the jury in position to believe that Hall, Patterson & Co. had paid the drafts in consequence of Penfield's telegram that stock was on the

way. It is true Penfield denies that he telegraphed any such thing, but he may not have been believed by the jury.

The subject of the last assignment of error is the overruling the motion of plaintiff in error for a new trial by the court and the rendition of judgment on the verdict (Record pp. 27, 28).

But, in conclusion, we believe that the merits of this case are with the plaintiff in error.

It has acted in the most perfect good faith throughout. On the receipt of the letter of the 15th of January, 1876, it refused to cash any more of Melson's drafts on Hall, Patterson & Co. The refusal continuing, Melson finding he can do no business, writes to Hall, Patterson & Co. that Penfield will not cash his drafts in consequence of that letter and requests them to give him his old authority so that he can get his drafts cashed, or else, he notifies them, he will leave their employ. He requests a reply by return mail (Record pp. 79, 80). About the time that that reply would reach Melson in the ordinary course of mail and about January 31st, 1876, Melson, Hall, Patterson & Co.'s own agent, comes to Penfield, the cashier, with a new letter of Hall, Patterson & Co, Its contents the plaintiff in error was not permitted to prove, but Penfield testified that on the faith of that letter the bank began anew to cash Melson's drafts on Hall, Patterson & Co. (Record pp. 64, 65, 66),

Soon after being notified by Melson that the Bank would not cash his drafts, Hall, Patterson & Co., find his drafts coming in on them anew. No bills of lading or shipping bills are attached to them, although the letter head on their letter of January 15th, 1876, directed that drafts on them must be accompanied by bills of lading. They go on paying drafts for ten months, aggregating fifty thousand dollars, without receiving a bill of lading with any one of them, and without asking or inquiring of the Bank anything about bills of lading or shipping bills. (Record pp. 50, 51). They are silent all this long time. They have not written to the Bank since the letter of January 15th, 1876, and no correspondence of any kind has taken place between them. On the supposition that a rule of the Bank, known to Melson, which forbade a stock agent to draw a draft unless stock was in transit was being complied with, (Record p. 75), the Bank cashed draft after draft, between February 1st and December 7th, 1876. Nothing has ever been heard from any of them. At length, it cashed, at Melson's request, two drafts, on December 7th, 1876. Having paid full value for them, it does what it has a right to do, sends them forward to the drawees for payment They are paid on presentation. It is ascertained that a loss has been made. Then the Bank first hears of shipping bills, then the first letter of Hall, Patterson & Co.'s to the bank since that of January 15th, 1876, is written, and it is invited to bear the loss. That the Bank did not expect Melson to violate its rule is certain. That the Bank would have cashed no more of Melson's drafts, but for the letter of Hall, Patterson & Co.'s, exhibited to Penfield by Melson, at the close of January, 1876, is equally certain.

But as we view this case there is nothing to distinguish it from

Craig vs. Sibbet et als, 15 Penna., St. 238.

In that case suit was brought to recover on an acceptance of certain drafts. The bills of lading attached had proven fraudulent. In that case as in this, the holder of the bills knew that the drawee expected that the drafts of the drawer, which he was in the habit of cashing, would be drawn against actual shipments, the only difference being as to the manner of acquiring the information. In the case in hand, it was acquired by notice by letter from the drawee. In that case the holder had found out the arrangement, as a result of drafts which had been returned to him

protested. But that knowledge was held to constitue no defense to the acceptance, there being no fraudulent conduct on the part of the holder shown, and the idea that the payee guaranteed the drawee's acts was negatived.

In First Nat. Bank of Detroit vs. Burkham, 32 Mich., 329, the drawees sought to recover back from the payees, money which they had paid on drafts with fictitious bills of lading attached. The Court say that the payees do not assume to guarantee the fairness of dealings between drawer and drawee. They then add:

"The law merchant gives the payees the right to assume that any draft they receive and forward, if it is accepted and paid, is a draft, which from the state of the dealings between drawers and drawees, it is right and proper that the latter should pay as the principal party; and the preumption of law that such is the case, is their complete protection if they received the bill in the ordinary course of business for value."

The bank was disappointed and deceived by Melson, so perhaps were Hall, Patterson & Co., but the deception was practiced by Hall, Patterson & Co.'s own agent. As between the bank and Hall, Patterson & Co. the bank should not return the money, for the deception was practiced by their own agent.

In Hern vs. Nichols, I Salk., 289, it is said:

For seeing somedody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger.

This doctrine was applied by this court in Merchants' Bank vs. State Bank, 10 Wal., 646. This principle should govern this case.

But on the supposition that Hall, Patterson & Co. were as innocent as the bank, and had been equally imposed upon with it, the money should remain with the bank.

Leather vs. Simpson, Law Reports, 11 Eq. Cas., 407.

The law on the ground of mutual mistake would certainly not help the drawee in this case, for it seeks to reverse the rule of commercial law.

First Nat. Bank of Detroit vs. Burkham, 32 Mich., 331.

The case of

Hoffman & Co. vs. Bank of Milwaukee, 12 Wal. 181,

affirms the same principles, and these authorities settle this case upon its intrinsic merits for the plaintiffs in error, which therefore asks a reversal of the judgment of the Court below.

WILLIAM McFADON,
For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

No. 768.

THE FIRST NATIONAL BANK OF QUINCY, ILLINOIS, PLAINTIFF IN ERROR,

vs.

S. FRANK HALL, FRANK D. PATTERSON, AUGUSTUS L. PATTERSON, MARTIN V. FRAZEE AND JEFFERSON E. GREER, PARTNERS, AS HALL, PATTERSON & CO., DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

REPLY OF PLAINTIFF IN ERROR.

QUINCY, ILL.:
CADOGAN & GARDNER, PRINTERS AND BINDERS.
1879.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

No. 768.

THE FIRST NATIONAL BANK OF QUINCY, ILLINOIS, PLAINTIFF IN ERROR,

vs.

S. FRANK HALL, ET ALS, DEFENDANTS IN ERROR.

REPLY OF PLAINTIFF IN ERROR.

In one place in the argument of counsel for defendants in error, The First National Bank of Quincy, Illinois, is called a mandate, in another place the agent of Hall, Patterson & Co. We think it apparent that the Cashier had not, by virtue of his office, the power to place the bank in any such position.

Waiving, however, this feature of the case for the sake of the argument, it is clear that before the bank could become either their mandate or agent, an undertaking on the part of the bank to become such, must be shown. This fact seems to be recognized by the counsel for defendants in error, whose whole argument is based upon the theory that the firm of Hall, Patterson & Co. had stipulated with the bank to act for their (not merely for its own) protection. On page 3d of their argument such statement is made. In the closing sentence of page 5th of their argument it is said, "Hall, Patterson & Co. proposed to continue to pay Melson's draft only on condition that the Bank before forwarding them for payment, would see that Melson had actually consigned stock purporting to cover them."

If the firm of Hall, Patterson & Co. did so stipulate or so propose, the stipulation or proposition must be found elsewhere than in a letter communicating notice of the limitation of their agent's authority—in other words, elsewhere than in the letter of January 15th, 1876.

It would be most unjust to hold that the bank had undertaken to protect Hall, Patterson & Co., there being no notice to the bank that any such thing was expected of said Bank, and the following statement suggests the reason. A man may take what chances he pleases when acting for himself. A man when acting for himself not unfrequently does take chances, which acting for another he would not take. Acting for himself one often does business in a way which he would modify if acting for another. If therefore the bank was expected to act for Hall, Patterson & Co. it was entitled to know that such an agency was expected of them. The letter of January 15th, 1876, did not tell the Bank any such thing, and yet counsel for defendants in error insist that said letter shall be read, as though the same had such a clause superadded to it.

But counsel for defendants in error on page 6th of their argument say, "Grant that no formal contract, in lawyer's phrases, was entered into, would not a business man who had *requested* a foreign correspondent to see that actual consignments followed drafts, be satisfied if that correspondent answered that he would in all cases see the shipping bills, which were the best evidences of such consignments."

The argument of counsel seemingly places them with us, upon the position that a request from Hall, Patterson & Co. was necessary, as the basis of a contract on the part of the bank to act for their protection. The point at which we diverge is as to the existence of such a request or as to whether such request was ever made to the bank. Counsel for defendants in error insist that the letter of January 15th, 1876, was such request. A perusal of said letter (Record pp. 33, 34) shows that no request of any kind was contained in it, and none being contained in it, their whole argument is upon false premises.

We desire to call the court's attention to the argument of counsel of defendant in error (argument p. 6), on the subject of the meeting of minds. The circuitous method and involved argument by which they show assent, seems to us to furnish a sufficient reason for saying that a court could not in any event instruct, as a matter of law, that the minds of parties met on the same proposition, in the same sense and to the same extent.

The commercial world would not have understood the letter of January 15th, 1876, as any thing but a mere notice. The letter of the 15th of January was such and nothing else. The reply of the 17th of January, 1876, was a counter notice of what the bank, in view of the changed condition of things, expected to have to do for its protection. These letters lack every element of contract.

The counsel for defendants in error try to attach some importance to memoranda upon the drafts in controversy. If they were statements of anybody, they were the statements of the drawer of the drafts, Hall, Patterson & Co.'s own agent. We have seen that drafts drawn by Melson read sometimes one way and sometimes another; that when written by any officer of the bank [illegible] filled up at Melson's dictation,

the bank officer merely acting as amanuensis, and that Melson did not always advise Hall, Patterson & Co. of shipments of stock (Record pp. 49, 56, 57). The conclusion is irresistible that these memoranda were those of Melson, and that their object was to facilitate the keeping of accounts by Hall, Patterson & Co. with their customers, and to convey information of the persons to whom they were to account for the proceeds of stock when sold. This was their only use and object.

But this much is clear from the argument of counsel for defendants in error, that the negligence, if any, is what Wharton on Neg. terms contractual negligence. That an action for negligence growing out of contract can only be maintained by a party to the contract is shown by our citations. But counsel seek to avoid the effect of these by citations showing that a guaranty to one member of a firm may be sued upon by a firm. The citations are of cases where the evidence showed tne contract to have been made for the benefit of the firm, though with one of the partners That the contract must under such circumstances be sued by all the firm, is clearly the rule.

Pars. on Part. * p. 334.

But in almost the same breath, and on the next page, the same author, speaking of the last named class of cases says: "But this differs from the case supposed in the last paragraph thus."

"A promise to a present firm with the understanding that others may come in and profit by it, is still no bargain with those others. They are not known, and are indeed uncertain as yet. But a bargain with one of a firm for the interest and benefit of all the firm is a present bargain with all the firm. And thus the rule remains good, that those and only those with whom the bargain is made can sue upon it."

If there might be cases where a contract could be made in contemplation of a change of firm, this is not such a case, and it is a sufficient answer to the authorities cited on this point by counsel for defendants in error, that there is no evidence in the record, that any change in the firm of Hall, Patterson & Co., was contemplated by parties when the letters of January 15th and 17th were written. The rule as laid down by

Parsons on Part., * p. 333,

is that a bargain with a firm expires with the dissolution of the firm or any change in it.

And the alleged contract being, from one stand point, a guaranty to pay advances to Melson, and from another, (on the theory of defendants in error) a guaranty on the part of the Bank of the acts of their own agent, the same rule follows from

Story on Part. 5th Ed. § 245.

But no notice of dissolution of the old firm was published, and none of the formation of the new, and the Bank never heard of the change of firm till suit was brought. That the new firm can not, therefore, even on

the theory of contract, sue is shown by the authorities cited in our argument, and upon the principle announced in

Boston Ice Co. vs. Potter, 123 Mass., 28,

a strong case which we have since found.

For contractual negligence—the present firm cannot sue—even if contract could be predicted upon the letters of January 15th and 17th, 1876, and it was error for the court to instruct that as a matter of law, the two letters made a contract between the new firm and the bank.

The knowledge of the change of firm resting with the defendants in error, if they failed to notify the bank of such change, it was their own fault and they alone should bear the consequence of their omission.

Counsel for defendants in error on page 21 of their argument, say in substance, that if the new firm of Hall, Patterson & Co. had refused to pay one of Melson's drafts, drawn against stock, the Bank could have compelled them to pay it by suit. But if the Bank could have recovered of the new firm at all, as supposed by counsel, the recovery could not have been had upon any contract with the old firm. The recovery must have been had independently of such contract, and the contract of the old firm could have been introduced in evidence in a suit against the new firm, if at all, not for the purpose of proving it to be a contract of the new firm, but for the purpose of showing in connection with other evidence, that *the new firm had renewed the authority, contained in and conferred by the letter of the old.*

See Boyce vs. Edwards, 4 Peters, 120.

To have recovered of the new firm upon an unpaid draft the bank would have been obliged to show that Melson had authority to draw such draft. If that proof could have been made at all, it must have been made by showing that the new firm had paid other drafts of like kind, by proof of the course of business between Melson and Hall Patterson & Co., and of the acts of the former, as agent at Quincy, Illinois—in other words by proof of the very facts and circumstances, which we sought to introduce in evidence on the trial below and which the court excluded (and this aspect of the case, this fact alone seem to us to show clearly the error of the court in so doing). The case of Boyce vs. Edwards 4 Pet. 120, excludes the idea, that a contract of the old firm would have been evidence to support an action of contract by the bank against the new firm. This case then, is but another in support of the doctrine that the bank, on the theory of contract, could not have new creditors thrust upon it without its consent, and that on a contract with the old firm, it could not be sued by the new one—the defendants in error.

As to so much of the argument of counsel as relates to the pleadings, we have to say that their citations do not show such a case as this. The cases cited by them are where, in connection with an allegation in itself sufficient to support an action on the case, the word *fraudulently and deceitfully* are used, or words of like import. In no one of the citations is there found a declaration setting forth, as does the declaration in the case at bar, specific and detailed allegations of fraud in fact. To reject

what counsel for defendants in error ask, would be to reject the whole body of the declaration, and leave but little more, if at all, than the inducement of their declaration. The cases cited are where only a few words had to be rejected.

If pleadings are to be relied upon as apprising a defendant of the cause of action—the declaration in this case certainly informed the bank it was called upon to answer a charge of fraud in fact.

But counsel for defendants in error think that they may recover for legal fraud on their declaration.

The citations in our argument show that having declared for fraud in fact, recovery can not be had for fraud in law.

But if contract results from the letters of the 15th and 17th of January 1876, as claimed by defendants in error, there is no legal fraud in the case. It is a mere breach of contract, which should be sued in assumpsit.

As to what is legal fraud, see:

Bouvier's Law Dic., Title "Fraud."

1 Story Eq. Jur. 9th Ed. §§ 258, 259, 333.

The facts of this case in no way answer the definition of legal fraud as there laid down, being but private transactions between parties, and in no way involving questions of public utility or concern.

In considering the question of whether the Court below erred in refusing to allow proof of the contents of the letter shown by Melson to the Cashier, Penfield, counsel for defendants in error speak of the evidence being overwhelming that such letter was never written. It did not strengthen the case that the five defendants in error denied having written such a letter. Penfield testified it was in Frank D. Patterson's hand writing It is true the latter denied writing it, but if proof of its contents had been admitted, it would have been a question for the jury to decide whether said Patterson did or did not write such a letter. That four men, neither one of whom was said to have written the letter, testified that they did not write it, can have no influence in the decision of the correctness of the ruling of the Court in rejecting proof of contents.

The only difference between the case of Craig vs. Sibbett, 15 Penna. St. 238, and the one at bar, is in the manner in which the payee of the drafts acquired his information that the drawer was expected to draw only against consignments. Unless the mode of acquiring that information makes a difference in result that case is decisive of the one at bar.

Counsel for defendants in error seem to suggest in argument that without reference to the theory on which the court below tried this case they ought to be allowed to hold their judgment. We presume that it will be evident at a glance that a trial of this cause by the court on the theory of contract, would lead to a series of instructions, that in any other aspect of the case would be improper, and to the exclusion of evidence, that on any different view of the case would have been proper.

As to any repetition in our argument we have only to say that we thought the convenience of the court would be subserved, if all the facts relating to and bearing upon the evidence erroneously admitted or rejected as we alleged, were grouped together, so as to be seen by the court at one glance in connection with the particular assignment of error under discussion.

WM. McFADON,

Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM. 1879.

No. 768.

First National Bank of Quincy, Ills.,
PLFF. IN ERROR,

vs.

S. Frank Hall, et al,
DEFTS. IN ERROR.

In Error to Southern District of Illinois.

Brief and Argument

SLEEPER & WHITON, Attys. of Defendants in Error.

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Brief and Argument for Defendants in Error.

WE propose first to review the theory and scope of this suit and the admitted facts upon which it is based, to see whether a meritorious cause of action is disclosed, and then to reply to some of the principal technical objections raised to the form of the action and the parties thereto, and to the rulings of the Court below in the admission and rejection of evidence, and in its charge to the jury.

I.

The main facts out of which the questions for decision arise, are fairly stated in the brief of the counsel for the plaintiff in error, but it seems to us that an attempt is made to envelope these facts, few and easily comphrehended, in a cloud of mystery and doubt, by far-fetched interpretations and minute analyses, which only illustrate the industry and ingenuity of counsel.

The salient points in the controversy are, that the defendants in error had determined to curtail the credit they had previously given their drummer Melson, at the Bank of the plaintiff in error, and this fact had been brought prominently to the notice of the Bank in a controversy that arose between the Bank's cashier and the defendants in error, growing out of the refusal of the latter to pay one of Melson's drafts which the Bank had discounted.

This led to the writing of the letter of January 15, 1876, by the defendants in error, and the reply of the Bank of January 17, 1876.

If language more direct and plain, less liable to misconstruction, or better adapted to secure the object sought by the defendants in error could be devised in a correspondence, we are unable to see it.

Let us put ourselves in the situation of the parties.

Hall, Patterson & Co., were not customers of the Bank, though they knew that Melson was, to the extent of getting his drafts cashed by it.

Melson lived at Quincy, and he happened to select this Bank as his place for getting his drafts discounted, and the de-

fendants in error were 300 miles away, at Chicago, and it took at least two days for stock to come through from Quincy to the Stock Yards in Chicago. Drafts would come sooner by mail, and when presented for payment it was all important to the defendants in error that they should know that stock was on the way, from the sale of which they could indemnify themselves for paying the drafts. The agent Melson was irresponsible, and the correspondence shows that prior to January, 1876, the defendants in error had become suspicious of his integrity.

To enable Melson to do business it was important that he should be in a position to make advances on consignments to Hall, Patterson & Co., and they were willing to honor his drafts for such advances, on condition that they could do so with safety, and so they stipulated for the security required, in their letter of January 15, 1876, and promised in the letter of the eashier of January 17, 1876.

This arrangement was an ordinary commercial and banking transaction, and imposed no burden on the bank but good faith and reasonable care, for which it was paid by the business done, and afforded the defendants in error a security for paying drafts before the arrival of consignments. This plan of conducting the business would, if followed, have proved safe to both sides, and only required a moderate amount of attention on the part of the cashier at the time he was preparing drafts on Hall, Patterson & Co., purporting to be drawn against stock as noted on the face of the drafts in his own hand writing, to require the production by Melson, of shipping bills, showing that he had actually shipped stock as intimated in the drafts.

Now when the intent of the parties interested, and the lan-

guage used by them as indicating that intent, were so plain and unmistakeable, counsel seek to find something occult and enigmatical in the correspondence referred to.

At page 26 of his brief, he says that Hall, Patterson & Co's letter of January 15, 1876, was one of two things, either a mere notice of a limitation engrafted on the authority of Melson to draw drafts on them; or an ordinary letter of credit, conferring conditional authority with a conditional promise to pay, and much metaphysical hair-splitting is ineffectually employed to settle in his mind the doubt as to which construction should be adopted.

On the contrary, we say that that letter was simply what it purports to be, viz: a cancellation of all previous authority on the part of Melson to draw, and a notification that from that date the defendants in error would not pay his drafts except upon actual consignments to them in transit, so as to meet drafts on day of presentation, or the next day thereafter.

The Bank was not asked to guarantee that the stock mentioned in drafts should actually sell for enough to cover the amounts paid thereon, but it was bound to exercise good faith and the care incumbent upon a bank, and was to see that shipping bills had been issued to Melson for the stock mentioned in the drafts, and if this good faith and care had been shown, and the amount of stock shipped seemed fairly sufficient ts indemnify the defendants in error, then they were bound to the Bank to pay the drafts.

The plaintiff in error was the only party that could protect the defendants in error from the fraud of Melson in drawing without consignments to cover, and in its letter of January 17, 1876, it expressly agreed that the defendants in error should

have the security they required, and the consideration was received in the business done.

No other sensible interpretation can be given to this letter, for it is clear that the Bank did not understand from it that Hall, Patterson & Co. would uot pay drafts till the actual arrival of stock, for if such a proposal had been made, the Bank would have declined to discount the drafts, till notified of the arrival of stock in Chicago to cover them. The plain meaning of the letter was that before discounting and forwarding for collection Melson's drafts, the plaintiff in error must be sure of a shipment of stock in good faith designed to cover the drafts as mentioned therein.

This it agreed to do, but counsel suggest that it was for its *own protection*, and not that of Hall, Patterson & Co., that it so agreed.

It is not easy to believe that this point is seriously urged, the absurdity of which is apparent from the terms of the correspondence and the situation of the parties.

What motive could Hall, Patterson & Co. have to notify the Bank that it must be careful not to trust Melson without security. The Bank could take care of itself by receiving the drafts simply for collection, but the whole course of business showed that the Bank had previously relied solely on the defendants in error undes their letter of credit to Melson. This letter was now revoked, and having been revoked, there was no occasion to caution the Bank for its protection, as Hall, Patterson & Co. proposed to continue to pay Melson's drafts only on condition that the Bank before forwarding them for payment, would see that Melson had actually consigned stock purporting to cover them. Had not the defendants in error the

right to stipulate for this security in proposing to continue to honor Melson's drafts in advance of the arrival of the stock referred to therein.

Much ingenious criticism is indulged in by counsel in attempting to show that no formal contract was made by the letters of January 15th and 17th, and it is said that defendants in error demanded *actual consignments*, while the Bank only promised to require *shipping bills*, and so it is claimed that the minds of the parties never met.

Grant that no formal contract in lawyers' phrases was entered into, would not a business man who had requested a foreign correspondent to see that actual consignments followed drafts, be satisfied if that correspondent answered that he would in all cases see the shipping bills, which were the best evidence of such consignments? Were not Hall, Patterson & Co., as merchants, justified in concluding as they did, that their request was assented to, and in paying without suspicion, as they subsequently did, drafts of Melson aggregating more than $50,000, and upon which the Bank received discount and exchange. Nothing occurred to excite the suspicion of the defendants in error that the Bank was neglecting its duty to see that shipping bills had been given for the stock mentioned in the drafts, for the stock came along regularly to meet the drafts as proposed in the letter of January 15th, but finally Melson gets ready to perpetrate a fraud, and the two drafts of Dec. 7, 1876 are presented for payment, representing on their face, in the handwriting of the Bank's cashier, that one was drawn against four car loads of hogs and cattle, shipped by one Tooley, and the other against five car loads of stock shipped by one Hunneyle. Had not the defendants in error the right to suppose in paying these drafts, that Penfield, the cashier who pre-

pared them with all their recitals for signature by Melson, had seen the evidence of the consignment of such stock by the exhibition to him of the shipping bills therefor.

Under the circumstances disclosed in this record, was it not the duty of Penfield before forwarding these drafts for collection, to see that the defendants in error had this security, they being compelled to pay before they could verify the truth of the recitals as to stock contained in the drafts.

The evidence is clear that during all the year 1876, from January 17, to the time the drafts in controversy were drawn, every draft contained a recital that it was made on account of stock shipped to cover, except in the case of a few drafts (less than half a dozen) which Melson drew on account of his salary or cattle of his own sent for sale by the defendants in error. If the defendants in error had a right to expect that the Bank would use reasonable care to see that they were secured in the manner stipulated for in the correspondence, then the neglect of that duty is a meritorious cause of action.

But it is suggested that Penfield had no power, as cashier, to make any agreement of the sort we claim.

Was not the arrangement one of a sort common to all banking business involving only moderate care on the part of the Bank to secure our clients from the loss they have suffered and for the exercise of which care the Bank was well paid in the business done.

Yerks vs. National Bank, 69 N. Y. 382.
Merchants Bank vs. State Bank, 10 Wall., 304.

But the learned counsel, after his 27 assignments of error, in the 14th subdivision of his brief, at page 32, compresses the

points which he claims settle the controversy in his client's favor *on the merits*, into three propositions?—

1st—That the Bank having done all that it did entirely innocently, and the party practising the deception being the agent of the defendants in error, they should bear the loss rather than the Bank.

2d—That on the supposition that Hall, Patterson & Co. were as innocent as the Bank, and were also deceived, still the Bank, in possession of the money, should be allowed to retain it, for the equities of the parties are equal.

3d—That because the dratts having been paid by the drawee on presentation, and as the law presumes, in obedience to a legal obligation, without proof of fraud on the part of the payee, there can be no recovery, and knowledge of the payee that the drawer had authority to draw only against actual consignments, does not constitute fraud.

As to the first proposition, it is suggested, (and the same suggestion occurs on almost every page of counsel's argument) that Melson was our *agent*, and so he was for some purposes, but that circumstance did not stand in the way of our putting limitations on his agency to guard against his possible frauds, and the plaintiff in error undertook to assist us in so securing ourselves—and saying that the Bank acted *innocently* is begging the question. While from the evidence developed on the trial, we exonerate Mr. Penfield from intentional fraud, his carelessness resulting in our loss, makes a constructive fraud that will sustain our action; just as if he had carelessly omitted to have a note presented in due time for payment, owing to its being mislaid and temporarily lost among his other papers.

Such loss carries a presumption of negligence which sustains an action on the case.

Chicopee Bank vs. Phila. Bank, 8 Wall., 141.

The Bank was also *pro hoc vice* our agent, or mandatary with compensation, to act for us in a certain matter of confidence, where reasonable care became a duty towards us, and Melson was *its* cnstomer, as well as our agent, within certain limits.

Such being the situation, and the Bank owing us a duty which it failed to perform, whereby we suffered a loss, there is an evident propriety in *our* invoking the maxim that where one of two innocent parties must suffer by the fraud of a third party that party must bear the loss who has put it in the power of the third party to perpetrate the fraud.

As to the second proposition, that if Hall Patterson & Co. were equally innocent, the Bank having got the money on the drafts into its hands, should be allowed to retain it, the equities being equal, we need only reply that we have shown that the parties were not equally innocent, and that the equities are not equal, for the Bank had the means of protecting itself and us too, and had agreed to use those means for our protection, and by neglecting to require shipping bills from Melson for the stock pretended on the face of the drafts to have been shipped to us, it enabled him to get the avails of the drafts, and then abscond. If any duty whatever was incnmbent on the Bank to see that the recitals in its cashier's handwriting on the face of Melson's drafts, as to the shipment of stock, were true, then it cannot be said that the parties are equally innocent, and that their equities are equal.

As to the third proposition, we admit that the drafts were

paid by the drawees on presentation, and that in the absence of any evidence to the contrary, the law would presume that such payment was made under an obligation to do so, but we deny the claim that Hall, Patterson & Co. cannot recover back this money from the Bank without proving an *actual intended fraud* on the part of the Bank in obtaining payment. So far as Hall, Patterson & Co. are concerned, they paid the money to the Bank or to its correspondent for it under a *mistake of fact*. That mistake arose from the constructive fraud of the Bank in giving the defendants in error to understand by the recitals on the face of the drafts in the cashier's handwriting, that stock had been shipped which seemed fairly sufficient to cover the drafts, and leaving them to infer that the Bank's cashier knew the fact from an inspection of shipping bills, and that he continued to respect the agreement contained in the letter of January 17, 1876.

Having paid the drafts under a mistake of fact induced by the culpable negligence of the Bank, and so having lost their money, the defendants in error have a right to demand a return of it for they have never received an equivalent *therefor* from the Bank. Even in the case of the payment of money to a party having an apparent right to demand it and using no undue means to obtain payment, if the payment was made under a misapprehension of facts, and it is inequitable that the payee should retain it, it may be recovered back in an action for money had and received.

Hall, Patterson & Co. were not bound to pay the drafts in controversy, because there was not the stipulated security, and having in ignorance of this fact paid the money, they could have recovered it back even in an action of assumpsit.

3 Addison on Contr., §§ 1406, 1407.

Marriot vs. Hampton, 2 Smith, L. C. 417 and notes.

Now on the other hand, the propositions upon which we base our right to recover on the merits, are these:—

I.

The letter written by the defendants in error to Penfield, the cashier, dated January 15, 1876, was a full revocation of any previous authority which Melson may have had to make drafts upon them, either from letters of credit or other authority from them, except upon the conditions named in such letter of January 15, that is to say, upon actual consignments of stock to them, and when the stock was in transit and would, in the regular course of business, reach them the same day or the day after the draft was presented to them. So that, after the receipt of that letter by the Bank, or Penfield as cashier, they would not have been bound to accept or pay any draft not drawn against an actual consignment of stock to them and in transit as expressed in the letter of January 15, 1876; and after the receipt by them of Penfield's letter of January 17, 1876, they had a right in paying the drafts of Melson, if there was no subsequent and different arrangement, to rely, for their protection, upon the promise contained in that letter, that he, Penfield, would not forward drafts on them for payment in advance of the arrival of stock to cover them, unless he had first seen shipping bills showing the shipment of stock which might fairly be presumed sufficient to meet such drafts, and if by a neglect of such duty the defendants in error have suffered a loss, the Bank is liable therefor, although there may have been no actual intent on the part of its officers to defraud.

2.

The letter of Penfield, cashier, of January 17, 1876, was an acceptanee of the notice to the Bank, of the revocation of Melson's authority, and an undertaking, on behalf of the Bank that it would not cash or discount or forward for collection, any drafts of Melson which were not drawn on actual consignments, and as evidence of such consignments and that the stock was in transit, that the Bank would thereafter require the production of shipping bills in all cases, and there being no evidence that Hall, Patterson & Co. ever waived their right to have all drafts on them drawn against actual consignments in transit, as stated in the letter of January 15th, it became and was the duty of the cashier and officers of the Bank to know that consignments of stock were actually on hand or in transit, to meet any draft it might cash or discount, before forwarding the same for collection, and if the Bank did cash or discount any such drafts, which were not drawn against such actual consignments of stock so in transit, and without requiring Melson to exhibit shipping bills showing that the stock was so consigned, it acted at its peril, and could not have required Hall, Patterson & Co. to pay such drafts, and if they did pay any such drafts, relying upon such understanding, and if the failure of the Bank to require the production of shipping bills, caused Hall, Patterson & Co. to lose the money so paid, then such conduct on the part of the Bank was such negligence as to render it liable in an action on the case for the actual damages occasioned by such neglect.

3.

If appearing from the evidence that the drafts in controversy were prepared for the signature of Melsen by the Bank's cashier, and purporting on their face to be drawn in connection with consignments of stock to cover them, it was the duty of the cashier before forwarding these drafts to be paid by Hall, Patterson & Co., in ignorance of the falsity of the recitals therein, to see that Melson had shipping bills for the stock referred to in such drafts, and if relying upon Melson's word, he omitted this duty and a loss resulted therefrom to the defendants in error, then the Bank is liable for such loss in an action on the case, for the memorandum on the drafts in the hand-writing of its cashier, referring to the car loads of stock amounted to a representation by him that the drafts were drawn on the consignment of the same to them, and they had a right to rely on the truth of such representations in paying such drafts, not being bound to pay if they were false, and it is no defense to the Bank in an action to recover back such payments that the cashier had in fact no knowledge as to the truth or falsity of such representations, and made no enquiry, for it was his duty to make enquiry for the protection of the defendants in error, for if he owed such duty for our protection, and omitted its performance carelessly, and thereby we suffered a loss, then the law implies a fraudulent intent sufficient to sustain an action on the case, irrespective of his actual motives or intent.

4.

In this cause it appears that the fraud of Melsen will compel one of two innocent parties to suffer the loss of the money paid on the drafts in controversy.

It is a maxim of the law that when one of two innocent parties must suffer a loss, that one must bear it whose acts or omissions occasioned the loss; and in this cause it appears from the evidence, that with proper care and observance of instructions, the Bank might have prevented any loss to either of the parties to this suit from Melsen's fraud, and that the defendants in error did not have an equal opportunity, therefore this maxim applies and the Bank should bear the loss.

The rules of law which sustain these propositions are elementary, and their enforcement of the first importance for the safety of commercial transactions. At §435 of Wharton on Negligence, a general rule is stated thus: "Whoever by contract, assumes a duty to another person, is liable in an action on the case to such other person for damages arrising from the negligent performance of such duty," and at §437 of the same work, it is said that "the confidence induced by undertaking any service for another is a sufficient consideration to create a duty in the performance of it," and at §511 it is stated that even where a person loosely engages to do an act for another, and then forgets to do it, there being no reward, yet if injury arises from his neglect, he is liable, if a confidence was offered and acceptad. Upon similar grounds attorneys, brokers, carriers and public officers, are held liable because their position imposes a duty, which if left unperformed, whether by mistake, forgetfulness or design, creates a liability for the consequent damages, to the party entitled to claim performance. Shear. & R. on Negl., §§156, 234, 261, 1 Hilliard on Torts, p. 37, 121, 123, 3d Ed., Morse on Banking, 331, 2d Ed.

Nor does the fact that we have a remedy against Melson prevent our proceeding also against the Bank.

Mathews vs. Mass Nat'l Bank, 1 Holmes Cir. Ct. U. S., 412.

We invite particular attention to this case which was an important one, and contains a very full citation of authority upon the liabilities of National Banks for alleged acts of negligence on the part of their Cashiers.

A class of cases of which *Leather vs. Simpson*, Law Reports, *11 Equity Cases, 407*, *Bank vs. Burkham*, 32 Mich., 331, and *Craig vs. Sibbett*, 15 Pa. St., 238, and *Hoffman vs. Bank*, 12 Wall., 193, are examples; are relied on as showing that the drawer of a bill who pays it, cannot recover back from the payee or his *bona fide* endorser, the money paid, because after the payment it is found that the drawer has failed to provide the drawee a promised security. Such is undoubtedly the law in the ordinary course of commercial affairs, but suppose, as was not the fact in any of the cases last referred to, that the payee or his endorsee *specially agrees in advance*, that he will, before forwarding the bill for payment, see that the drawer has provided a certain fund to cover such draft. Is there no difference in the cases? *Legem Enim Contractus Dat. Allen vs. Merchants Bank*, 22 Wend., 233. It is also suggested by counsel that even if he conceded that the Bank was in duty bound to see that Melson had shipping bills for the stock referred to in his drafts, yet that that obligation would be discharged if Melson exhibited *counterfeit* shipping bills, which being in legal effect no bills at all, the shadow might also be dispensed with and not even counterfeit bills be required, and it is supposed that *Leather vs. Simpson* and the other similar cases referred to above, sustain this view. In *Leather vs. Simpson*, time bills come to the Union Bank of London from

America for collection from the drawee in Liverpool. Accompanying the bills were counterfeit bills of lading for cotton, purporting to cover the drafts. In transmitting the drafts to its corresponding bank in Liverpool, the Union Bank mentioned that it retained the bills of lading, and no one suspecting the fraud, the drawee paid the drafts before maturity. Then the discovery of the fraud being made, the question was, whether the Union Bank had *guaranteed the genuineness* of the bills of lading by its reference to them in transmitting them to Liverpool, as stated.

It was held that the Union Bank having undertaken no duty towards other parties, beyond good faith, being a mere collecting agent, did not guarantee the genuineness of the bills of lading. A similar view was taken in the other cases of this sort cited by counsel. In *Hoffman vs. Bank*, 12 Wall., the decision is placed on the ground that the "bills of exchange are in the usual form, and contain no reference whatever to the bills of lading, and it is not pretended that the defendants (the payees) had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability." The Court subsequently say that "testimony to show that the payees were not *bona fide* holders of the bills, would be admissible," &c. Now suppose in that case that the Bank of Milwaukee had expressly promised Hoffman & Co. that it would see that shipping bills evidencing consignments of flour to them had in every case been made, as noted in a memorandum on the drafts themselves, for the purpose of indemnifying Hoffman & Co. for accepting in advance of the arrival of the flour, would not this have given the transaction a different aspect, and one more like the case at bar.

Was the promise of the plaintiff in error contained in the letter of Jan. 17, to be satisfied by taking bogus shipping bills at least without examination to prevent imposition, or showing a *bona fide* attempt to secure the defendants in error from loss, or least of all, by omitting to require even counterfeit shipping bills or any pretense of security whatever.

Unless that letter was wholly meaningless, it imposed some duty on the plaintiff in error for our protection, not to be satisfied with a mere pretense of performance, and its neglect furnishes a meritorious cause of action.

II.

We now come to examine some of the *technical* objections made by counsel to the affirmance of our judgment.

1. It is said that an action of case will not lie, and that our remedy, if any, is upon contract under the agreement made by the letters of Jan. 15th and 17th, and the well known case of *Masters vs. Stratton*, 7 Hill, 103, is much relied on as sustaining this position.

That litigation and this exactly illustrate the distinction between actions necessarily brought on the contract and those prosecuted for a neglect of a duty arising out of a contract. In that case the defendant had covenanted to cultivate a farm and take care of a flock of sheep on it in a certain way, and he neglected the sheep, whereby a loss occurred, and this was held merely a breach of the written contract, so that *case* would not lie.

But our action is not for the breach of a promise to pay money, erect a building, cultivate a farm, return a flock of sheep, or perform any other executory contract in a specified manner, but we claim *consequential damage* because the plaintiff in error failed to perform a duty which it owed to us for our protection, and the evidences of that duty are the correspondence and the circumstances surrounding the transaction.

It is said by counsel that an act or omission connected with a contract to constitute a tort, must be one which from its nature the law has been solicitous to bring within its own provisions, and that it must, therefore, be of *public concern*.

It is acknowledged that the omissions of lawyers, physicians, bailees and public officers will support the action, and if so, why is not the diligence and capacity of the managers of banks, and especially of National Banks, a matter of public concern, so as to make them equally amenable to an action on the case for negligence. But there is nothing in the distinction suggested.

It often happens that a plaintiff has his choice of remedies either on the contract, or using the contract as the inducement to his charge of a neglect of duty. As the Court say in *Emigh vs. R. R. Co.*, 4 Bissell, 115, "where there is a contract either express or implied, from which a common law duty results, an action on the case lies for a breach of that duty, in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action."

In 1 Chitty's Pldgs, 135 marg'l the rule is stated in this language:

"Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that

obligation, and a consequential damage, then, although assumpsit may be maintainable on a promise implied by law to do the act, still an action on the case founded in tort is the proper form of action in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and damage resulting from that breach."

See *Burnett vs. Lynch*, 5 B. & C., 589.
Mast vs. Godson, 3 Wils., 348.
Govett vs. Radnedge, 3 East., 62.
Boorman vs. Brown, 3 Ad. & Ellis, N. S. 571.
Pozzi vs. Shipton, 8 " " 963.
Coggs vs. Bernard, and cases cited, 1 Smith, L. C.
Gill vs. Middleton, 105 Mass., 477.
Allen vs. Suydam, 20 Wend., 321.
Brown vs. Arrott, 6 Watts & S., 402.
1 Hilliard Torts, 3d Ed., p. 1, 14, 25, 26, 32 to 38 96, 119 to 123.

As to what a declaration should contain in a case like this, the rule is stated thus:

" Where the plaintiff's right consists in *an obligation on the defendant to observe some particular duty* the declaration must state the nature of such duty which we have seen may be founded either on *contract* between the parties or on the obligation of law arising out of the defendants *particular* character or situation and the plaintiff must prove the duty as laid and a varience will as in actions on contracts be fatal. When the declaration is for a breach of an express or implied contract and proceeds for a *nonfeasance*, the consideration for the contract must be stated either in terms or in substance."

1 Chitty Plds., 383 marg'l.
See 1 Hilliard Torts, 122.

An examination of the declaration and the evidence adduced on the trial will show that we brought onrselves within these rules. The plaintiff in error was a bank, holding itself out to the world as possessed of the requisite qualifications for doing a banking business. The law imposed certain obligations of capacity and fidelity in the conduct of such a business, to which, in our case, was superadded an express agreement to do certain things for our protection. There was no substantial variance between our declaration and proof, and the Bank received its consideration for its implied and express agreements in the profits it got from the business done.

Shear. & R. on Negl., §238.
Bank vs. McKnister, 11 Wend., 473.
Smedes ve. Bank, 3 Cow., 662.

2. Another technical objection much relied on by counsel is the fact that there was a change in the firm of Hall, Patterson & Co., by their admitting two of their old clerks in April, 1876, to an interest in the business, the style of the firm continuing the same.

The claim made is this in substance: That conceding that under the correspondence of the preceding January, and in view of the circumstances surrounding the parties at that time, a duty was created on the part of the Bank to take a certain care for the protection of Hall, Patterson & Co. from the fraud of Melson, yet that when in April two new men entered the firm, that fact *ipso facto* instantly vacated all obligation on the part of the Bank to take any care to protect the firm with the added new members. There is no evidence that the Bank ever knew or enquired for the names of the members of the firm at any time until they were informed by the commencement of

this suit. No question of good faith is involved, as the composition of the firm was not a matter of the slightest moment to it. It corresponded with Hall, Patterson & Co., as a firm, and was satisfied with their financial soundness. As to its engagements, it entered into no executory contract to pay money to the firm, or do any service involving an outlay of money or labor. It simply agreed that it would observe a certain care essential to the protection of Hall, Patterson & Co., whoever they might be, from the fraud of Melson. Was this a case then where it could be said that the Bank entered into an executory contract with 3 members of the firm, and that when 2 more were added to it, the contract ended. Suppose the Bank had learned from outside sources of the admission of the two new members into the firm, and that then Hall, Patterson & Co. had refused to honor one of Melson's drafts, though drawn in accordance with the requirements of the letter of January 15, would not the learned counsel for the Bank have thought it a strange defense if we had urged that the change in the firm coupled with notice on the part of the Bank of that fact, was an effectual release of the engagements of the firm to honor that draft, yet such must have been the result, if the same facts released the Bank from further duty toward Hall, Patterson & Co.

If the Bank, after April, 1876, could call upon Hall Patterson & Co. to honor Melson's drafts, drawn in conformity with the letter of January 15, then the correlative right existed on the part of the firm, whoever its members might be, to require the Bank to observe the care it agreed to bestow in the letter of January 17.

Suppose that on the 15th day of January, 1876, the Adams

Express Company had made a contract with Hall, Patterson & Co. to carry money for them to New York, one year, at fifty cents per thousand dollars, and that at May 1, 1876, the Express Company had declined to carry longer at that rate simply because two new men had come into the firm would that have been a valid defense in a suit for a breach of this contract. We suppose not, and for the reason that the spirit and scope of the engagement had no relation to the individuals composing the firm. Such we understand to be the authorities, even in actions *ex contractu*. Thus a guaranty given to one partner, may enure to the whole firm, and be sued on as such.

Garrett vs. Handley, 4 B. & C., 664.
7 D. & Ryl, 144.
Walton vs. Dodson, 3 C. & P. 162.
Alexander vs. Barker, 2 Crompt. & J, 133.

So where a note was given to a firm as security, it was held that it might be so framed as to enure to the benefit of future partners, and it was held that being made to the *order* of the firm, extrinsic evidence was admissible to show that it was intended to enure to the benefit of future partuers as well as present ones.

Pease vs. Hirst, 10 B. & C. 122.
Barclay vs. Lucas, 1 Term., 291.
Weston vs. Barton, 4 Tannt., 673.
Pemberton vs. Oaks, 4 Russ., 154.
2 Collyer on Part., § 629 to 635.

But this is not action upon contract, and the contract is only referred to as showing a certain duty for the breach of which we sue. We are not required to prove a joint contract on the part of 5 partners, but only a duty due to a firm under

all the circumstances. We say that until they gave notice to the contrary, Hall, Patterson & Co. continued to be bound after the change in the firm, to honor drafts of Melson drawn to the order of the Bank and discounted by them, if the instructions of the defendants in error in their letter of January 15th were followed by the Bank, and such being the case, and the security of the Bank not being diminished but increased by the change in the firm, and the Bank never having any knowledge or made any enquiry as to who composed the firm, it cannot now make an objection based upon such change, especially when the suit is tort for a breach of duty owed to Hall, Patterson & Co. as a firm.

The only question is whether the firm had any right under all the circumstances to continue to rely on the bank's taking the same care for their protection after the admission of the two new members as before. We say they had looking to the spirit and scope of the engagement, and the fact that Hall, Patterson & Co, were not weakened but strengthened by the addition of the new members, and so made the better able to carry out their agreement to honor Melson's drafts.

3. Again it is urged with much emphasis, that by our declaration we have charged *actual fraud, malice and conspiracy*, and are therefore bound to prove these things to sustain our action.

In 1 *Chitty's Plds., margl*, it is said that "if a malicious and wrongful intent be unnecessarily stated, it need not be proved," and this rule was applied in *Williamson vs. Allison* 2 East. 446, where the words *fraudulently and deceitfully* were rejected as surplusage. See also *Panton vs. Holland* 17 Johns, 92, 1 Hilliard Torts 122. 123. In the case of a merely negligent fire on the defendants premises by which the plaintiff's premises were also

destroyed the averments of fraud and bad intent in the declaration were charged as strongly as in the case at bar, *Filliter vs. Phippart* 112. Q.B. 347. So in a representation as to a party's pecuniary ability which proves false, although the maker of the representation was simply careless and did not intend to defraud. Yates Plds., 398. A man is presumed to intend the natural result of his acts and if he gives a false statement as to a party's standing and credit and damage results to a stranger who relies on the statement, he cannot be allowed to defend on the claim that he did not intend to do an injury.

He is guilty of a legal fraud and may be properly charged with fraud in a suit against him.

Notes to *Pasley vs. Freeman* 2 Smith's L. C. 113.

At the time the declaration was filed we could not anticipate what the evidence on a trial would show, as to the actual complicity of the Bank's Cashier in the fraud of Melson, and so in addition to the charge of negligence there were added charges of actual fraud and conspiracy. The evidence did not show any intentional fraud on the part of the Cashier, but only careless and negligent conduct which led to our loss. This was fraud in law, and proof of it sustained the gist of the action, and the charge of intentional fraud was simply vituperative surplusage.

The rule on these questions which prevails in the federal courts, is well stated thus: "Although a declaration may be informally framed, yet if it embodies all that is essential to enable the plaintiff to give evidence of his right and of its violation by the defendant, and affords the defendant an opportunity to interpose the defenses allowed by law, the court will not encour-

age objections merely critical, but will seek even on special demurrer to sustain the pleading."

Wilder vs. McCormick, 2 Blatch., 31, and see
Rogers vs. Marshall, 1 Wall., 644.
Laber vs. Cooper, 7 Wall., 570.

4. It is further claimed that the Court erred in assuming to construe the correspondence of January 15th and January 17th and should have submitted to the jury the question as to what the Cashier meant in using the term, "We shall require shipping bills." There was certainly no ambiguity in this language, and it would be a novel proceeding to ask a jury to construe a written instrument, perfectly plain in its terms, and where no evidence had been offered to explain supposed ambiguities.

5. On page 30 of the brief of counsel, in point 9, it is claimed that there was error in the refusal of the Court to permit parol proof of the contents of a letter alleged to have been written by Hall, Patterson & Co., and shown to the Cashier subsequent to January 27, 1876. It is evident that the ground had not been laid for proving by parol, the contents of this alleged paper, as it was in the hands of Melson, who although he had absconded might yet by due diligence perhaps have been found and compelled to testify.

But the conduct of Melson, when he is said to have shown this paper to the Cashier (transcript p. 25), should have aroused his suspicion that it was an altered or forged instrument, and at least have incited him to write to the defendants in error to ascertain the facts. Moreover it appeared that Penfield by whom alone it was proposed to prove the contents of this supposed instrument, had no definite knowledge of its tenor, beyond the fact that he claims it led him to change his course of business

but the evidence was overwhelming that the defendants in error had not written any such letter in fact, as was testified to by every member of the firm, and no jury would have been justified in giving credence to the vague recollections of Penfield, as against the positive testimony of five unimpeached witnesses. (Transcript, p. 30.)

But if the parol proof proposed had been competent, if duly followed up, yet its exclusion worked no injury to the plaintiffs in error, for it is certain from the evidence, that no such letter was really written by Hall, Patterson & Co. Although Melson earnestly solicited a revocation of the limitations placed upon his authority to draw, by the letter of Jan'y 15th, 1876, if it be true that no change in that arrangement was ever assented to by Hall, Patterson & Co., then it was not enough to show that a pretended letter was exhibited to Penfield, but the offer should have gone further, and proof should have been tendered that the defendants in error were informed that Melson had shown such a paper to the cashier, otherwise they could not be bound by a forged letter shown to the cashier, even though he afterwards acted in the belief that it was genuine.

Nor was evidence admissible of the acts of Melson after January 15th, 1876, in apparent conflict with the letter of the defendants in error of that date, inasmuch as it was not proposed to bring home to the defendants in error a knowledge of such acts.

6. It is also claimed that it was error to allow secondary proof as to contents of telegrams between the parties to this suit after Melson absconded. 1st, because no notice to produce the original was given, and 2d, because the proof of the de-

struction of the telegrams was insufficient. The notice to the plaintiff in error to produce telegrams and other documents, is not in the record, though we claim that it was sufficient, but the contents of the telegrams were not sought beyond establishing the fact that enquiries after the stock were made by telegraph and responses given by the bank. Besides the testimony was entirely harmless, having no tendency to establish any liability on the part of the plaintiff in error, and could have had no weight with the jury.

7. It is also claimed that the court erred in refusing certain evidence tendered as to the acts of Melson before and after January 17th, 1876, the course of business at the Quincy stock yards, the good faith of the cashier, and the interpretation which he put on his letter of January, 17th 1876; the old correspondence of the defendants in error, prior to January 15th 1876, with Melson, and their relations to him when such correspondence took place. It is manifest that none of these matters would, if proved, have had any tendency to vacate and annull the specific arrangement made by the Bank on the 17th January, 1876, unless it were also shown that the defendants in error consented to the change; or were estopped from insisting on the continuance of that arrangement.

III.

In what we have said we have discussed to some extent most of the points suggested in the 27 assignments of error. These alleged errors are repeated in so many forms that it is not easy to meet them without repetition and perhaps misjudging as to what are really relied on.

The 1st, 2d, 3d, 4th and 5th assignments are for alleged erroneous instructions to the jury. We think we have shown that the rules of law laid down in these instructions are sound and applicable to the facts in evidence. The controlling facts were few, and scarcely disputed. Ought not the Judge to have told the jury that under the correspondence a duty arose on the part of the Bank to exercise a certain care for our protection, and was he not justified in further saying that that duty continued to the time of the payment of the drafts in controversy, unless they found from the evidence that some new arrangement was made after January 17th, 1876.

The charge in this respect was more favorable than the plaintiff in error was entitled to, for there was really no evidence of any change, or any circumstance suggested that ought to estop the defendants in error from denying a change.

The 6th and 7th assignments relate to the admission in evidence of the letters of January 15th and January 17th, 1876. We suppose that the point of the objection lies in the fact that in the following April a change was made in the firm. We have sufficiently discussed this question already.

The 8th, 9th, 10th, 11th and 12th assignments are for refusals of the Judge to give certain charges to the jury. The sole question is whether the charge as given was fair and covered the case. The real issues lay in a very narrow compass, and it would have been darkening counsel by words to have given the jury the long and argumentative charges framed by the acute and ingenious counsel of the plaintiffs in error.

There is nothing in the 13th assignment, for after the developements of the trial, we acknowledged that Penfield did not collude with Melson to cheat us, but only acted negligently,

and this was enough to sustain the action, as we think we have sufficiently shown.

The 14th and 15th assignments are equally untenable. What Penfield's private intentions were in writing the letter of January 17th, or what were his views as to the desirability of retaining the business of Melson, are wholly immaterial.

The 16th, 17th, 18th and 19th assignments relate to the rejection of certain old letters written by Hall, Patterson & Co. They could have no tendency to affect the subsequent arrangement made by the correspondence of January 15th and 17th, 1876.

The 20th and 22nd assignments are obviously baseless as the matters suggested were wholly immaterial.

As to the 21st assignment we have already expressed our views.

The 23rd, assignment relates to a matter wholly unimportant.

As to the 24th and 26th assignments we think it clear that as a part of the plaintiff's case on the trial below, it was competent, after proving the arrangement made with the Bank in January 1876, to go further and ~~testify~~ shew that they had never changed that arrangement by giving a new letter of credit to Melson, thus meeting in advance any suggestions that might be made to the contrary.

As to the 26th assignment as already shown it relates to a matter of no importance being a simple enquiry as to what had become of the stock referred to in the drafts in question, and a response affording no real information.

The 27th and last assignment is for alleged error in not seting aside the verdict and ordering a new trial.

We have thus endeavored fairly, and with the greatest brevity possible, to discuss the multitude of questions of more or less importance raised by the counsel of the Bank in his able and elaborate argument.

We think the Court will agree with us that the great majority of these questions are put forward to befog rather than elucidate the real subject of controversy.

But out of the mass of unimportant matters which your Honors have been asked to consider, there plainly appear the salient controlling facts that the Bank *did* assume a duty towards us which continued till we suffered our loss, that the proximate cause of that loss was the neglect of that duty, and the legal result was a liability to us for that damage.

We acknowledge it is hard that the Bank should lose the money paid on the drafts in question, but it is equally hard for us to lose it, and the Bank having had the means to prevent the loss both to it and us, and having neglected to use those means as it had agreed to do, it must suffer rather than we, under the familiar maxim applicable to such a state of facts.

SLEEPER & WHITON,
Attys. of Defts. in Error.